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## Judicial Administration

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# Judicial Administration

Bijal Shah\*

*“Presidential administration” has been discussed for the last twenty years. However, scholars have not considered whether courts are doing the same thing. Like presidents, courts may oversee the quality of administrative action under authority granted by the Constitution and legislation. And also, like presidents, courts make policy decisions in lieu of the agency that has been delegated policymaking power.*

*This Article draws on case law and legal scholarship, as well as work from public administration and political science, to construct a paradigm of “judicial administration.” More specifically, it offers a history of and traces the tension between the “overseer” and “decider” approaches to judicial administration. In addition, it explains the implications of these approaches for the constitutionality and efficacy of judicial review today.*

*First, this Article considers judicial administration as accomplished through the reinforcement of administrative procedure. These efforts were criticized as judicial policymaking by formalists. However, as this Article notes, these decisions focus on reconciling administrative action with constitutional, technical, and rule-of-law norms and are thus rooted in overseer impulses. In other words, the decider dimensions of even the most intrusive judicial review of agency process have been overstated.*

*Second, and in contrast, this Article notes that the recent call to overturn Chevron constitutes uncritical advocacy for the decider approach to the judicial administration of statutory directives. In the past, courts have limited their role in the administration of legislation to that of overseer. However, today’s formalists seek to implement de novo review wholesale. This effort is, at its core, a push for courts to decide policy in lieu of the agencies to*

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*which Congress has delegated policymaking power or to which policymaking power belongs as a matter of executive authority.*

*This may not trouble functionalists much. But it should trouble the very formalists who denounce Chevron. First, this evinces an inconsistency in their position, given that many have condemned what they identify as judicial policymaking in administrative process. More broadly, as in presidential administration, the decider approach to judicial administration runs the risk of treading on the legislature's authority to make the law. To the extent this is the case, calls to dismantle the administrative state and instate the judiciary in its place are focused on reimbursing the wrong branch of government.*

*For those interested in judicial intervention as a means of regulating the administrative state, including the exercise of presidential power, the overseer model of judicial administration is less likely to offend a formal conception of the separation of powers. Furthermore, long-standing paradigms of judiciary as overseer confront the pressing issues—namely, the denigration of administrative due process and corrosion of expertise in service of the President's agenda—resulting from today's unsupervised executive branch.*

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## INTRODUCTION

The judiciary influences the administration of law. Courts have the power to shape or even direct administrative activity, or to stop it in its tracks. This Article refers to this paradigm as “judicial administration.”

Almost twenty years ago, then-Professor Elena Kagan introduced the concept of “presidential administration,” whereby the President is involved in agencies’ administration of the law.<sup>1</sup> Since then, the scholarly treatment of presidential

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1. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (introducing the theory of “presidential administration”); see also Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 650 n.40 (2020) (noting constitutional arguments both for and against presidential administration by scholars such as Steven Calabresi, Elena Kagan, Jerry Mashaw, Peter Shane, and others). Kagan argued that the President has authority to direct agency action. See Kagan, *supra*, at 2247, 2250. Others have suggested that “presidential administration” is better understood as presidential “efforts to control bureaucratic discretion from outside of the agencies.” Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIA. L. REV. 577, 577–78 (2011) (arguing that the “administrative presidency” has played a role in deteriorating agencies). While Kagan’s work made a lightning rod of the topic, a body of thoughtful literature on presidential control of agencies existed prior to 2001. See, e.g., FRANCIS TROWBRIDGE VOM BAUR, *FEDERAL ADMINISTRATIVE LAW* 94 (1942) (noting that agencies “acting as the administrative arm of the legislature [are] necessarily free from executive interference”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1105–06 (1988) (discussing the rise of presidential control over the “regulatory matrix”); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) hereinafter Bruff, *Presidential Management of*

administration,<sup>2</sup> and to some extent, the “congressional administration” of agencies,<sup>3</sup> has been thorough. For instance, scholars have considered the mechanisms of presidential administration,<sup>4</sup> whether presidential administration overwhelms or is at odds with the congressional priorities that govern agencies,<sup>5</sup> and whether presidential administration violates the constitutional separation of powers by infringing on the legislature’s authority to empower the administrative state.<sup>6</sup> This Article brings to the fore the mechanisms of *judicial* administration, confronts its constitutional implications, and considers its relevance today.

Today, courts influence agencies to engage in certain conduct or to adopt a particular approach to implementing the law. One way courts do this is by reviewing agency action. This can include interrogating the quality of agencies’ policy records or evaluating the processes, like rulemaking and adjudication, by which agencies come to their policy decisions. For instance, in 2019, the Supreme Court denied the Department of Commerce’s effort to put a question about citizenship on the U.S. Census.<sup>7</sup> The agency made this effort to further President Trump’s goals for immigration policy.<sup>8</sup> In this case, the Court began its analysis consistent with the

Rulemaking]; Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979) [hereinafter Bruff, *Presidential Power and Rulemaking*].

2. See, e.g., Shah, *supra* note 1 (discussing how Presidents control independent agencies by litigating against them); Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RES. L. REV. 1083 (2015); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953 (2015); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Daniel B. Rodriguez & Barry R. Weingast, *The “Reformation of Administrative Law” Revisited*, 31 J.L. ECON. & ORG. 782, 782–83 (2015) (arguing for “the critical role of Congress and the President in the reformation of both the American regulatory state and administrative law”); Daniel P. Rathbun, *Irrelevant Oversight: Presidential Administration from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643 (2009); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King*, 115 YALE L.J. 2611, 2613 (2006). The list goes on.

3. See, e.g., Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395 (2020); Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 1961, 1963–65 (2019) (considering dynamics of congressional administration—in particular, how the legislature controls agencies through statutes requiring administrative coordination); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

4. See Kagan, *supra* note 1, at 2247–50 (discussing the different approaches to presidential administration taken by Presidents Reagan, H.W. Bush, and Clinton).

5. See, e.g., Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397, 425 (2018); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 745 (2016).

6. See Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 274 (2006) (“It is that open question—that is, the authority of the President to direct the discretionary powers delegated to officials—the contemporary debate pursues.”). Even Kagan herself, enthusiastic as she was about presidential administration, noted that it proceeds without statutory authorization. Kagan, *supra* note 1, at 2319–20 (“In directing agency officials as to the use of their delegated discretion, the President engages in such [lawmaking] functions, but without the requisite congressional authority.”).

7. See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573–76 (2019) (holding that the agency’s action was illegitimate because it “rested on a pretextual basis”).

8. *Id.* at 2581 (Alito, J., concurring in part).

application of the Administrative Procedure Act's (APA) arbitrary-and-capricious standard under "hard look" review, which considers the quality of administrative decision-making.<sup>9</sup> Consistent with hard look doctrine,<sup>10</sup> the Court sought to consider "what role political judgments can and should play" in the administration of the Census.<sup>11</sup> Ultimately, the Court held the action was illegitimate because the justification for it was based in pretext.<sup>12</sup> As a result, the Trump administration was forced to end its pursuit of this policy just one week later,<sup>13</sup> despite the President's continued interest in pursuing this policy.<sup>14</sup>

In another example in which the judiciary might shape administrative policymaking, the Environmental Protection Agency recently rescinded the Clean Power Plan (CPP) rules that the agency issued under the Obama administration<sup>15</sup> in response to an executive order issued by President Trump.<sup>16</sup> Like the case that initiated hard look, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>17</sup> "[t]he Trump Administration's proposal to repeal the Obama Administration's CPP rules presents a similar situation—a new administration that campaigned on a deregulatory platform is seeking to rescind one

9. See *infra* Section I.C (discussing the basis for hard look review); *Dep't of Com.*, 139 S. Ct. at 2569.

10. See *infra* Section I.C.1 (arguing that courts oversee the influence of politics on agency action via hard look review).

11. *Census Act—Review of Administrative Action—Judicial Review of Pretext—Department of Commerce v. New York*, 133 HARV. L. REV. 372, 372 (2019).

12. *Id.*

13. Michael Wines, *2020 Census Won't Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html> [<https://perma.cc/KJQ2-LFXB>] ("The Trump administration, in a dramatic about-face, abandoned its quest on Tuesday to add a citizenship question to the 2020 census, a week after being blocked by the Supreme Court.").

14. Jacqueline Thomsen, *DOJ Reverses, Says It's Trying to Find Ways to Include Citizenship Question on 2020 Census*, THE HILL (July 3, 2019, 5:36 PM), <https://thehill.com/homenews/administration/451639-doj-ordered-to-find-ways-to-include-citizenship-question-on-2020> [<https://perma.cc/5N3T-SJM7>] (describing Judge Hazel's conundrum). Indeed, the President's interference with the judicial ruling was so strong that one district court judge (Judge Hazel) sought to determine whether "there could be a mechanism by which I order—and, again, I'm not saying I'm inclined to do this—the Census Bureau or the Department of Commerce to take whatever steps are necessary to counteract [the President's tweets], which [I admit] is an odd place for the judiciary to be." Transcript of Proceedings at 11, *Kravitz v. U.S. Dep't of Com.*, 366 F. Supp. 3d 681 (D. Md. 2019) (No. 8:18-cv-01041-GJH) (ordering that either the parties propose a scheduling order for the equal protection claim at issue in the suit or that the Department of Commerce enter into a stipulation indicating that the citizenship question will not appear on the Census).

15. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

16. Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

17. 463 U.S. 29 (1983).

of its predecessor's major regulatory initiatives."<sup>18</sup> It remains to be seen, however, whether the judiciary will apply hard look to this deregulation, as the Supreme Court did in *State Farm*,<sup>19</sup> or whether it will take a lenient approach under the APA's arbitrary-and-capricious standard. In any case, the courts have the power to decide whether this regulation lives or dies.

The Court has ended other agency attempts to administer the law through judicial review of agency action—notably, by determining that certain administrative policies are illegitimate because they are not the result of adequate rulemaking processes. In 2019, the Court held that the Department of Health and Human Services's new policy that dramatically and retroactively reduced Medicare payments to hospitals serving low-income patients must be vacated because the agency neglected its statutory notice-and-comment obligations.<sup>20</sup> In 2016, the Court stopped the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA), implemented by the Department of Homeland Security as part of the Obama administration's immigration agenda, because the program had not gone through the notice-and-comment process (and because it was arbitrary and capricious).<sup>21</sup> However, in a throwback to *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*,<sup>22</sup> the Court also reasserted, in 2015, the view that the judicial augmentation of rulemaking requirements “imposes on agencies an obligation beyond the [APA]’s ‘maximum procedural requirements.’”<sup>23</sup> Therefore, although courts can ensure that agencies engage in the bare minimum of APA rulemaking requirements, they may not add steps to the regulatory process.<sup>24</sup>

Judicial efforts to square administrative statutory interpretation with legislative intent also alter how agencies implement the law. In 2019, the Court interpreted the

18. Jack Beermann, *The Deregulatory Moment and the Clean Power Plan Repeal*, HARV. L. REV. BLOG (Nov. 30, 2017), <https://blog.harvardlawreview.org/the-deregulatory-moment-and-the-clean-power-plan-repeal/> [https://perma.cc/JTL2-JVUJ].

19. See *State Farm*, 463 U.S. at 55–57; see also *infra* text accompanying note 227.

20. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816–17 (2019).

21. *United States v. Texas*, 136 S. Ct. 2271 (2016), *aff'g* *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). More specifically, “an equally-divided Supreme Court affirmed the Fifth Circuit’s invalidation of the initiative because it was not promulgated as a rule, by means of a sharply-defined notice-and-comment process.” Bijal Shah, *Putting Public Administration Back into Administrative Law*, JOTWELL (June 12, 2018), <https://adlaw.jotwell.com/putting-public-administration-back-into-administrative-law/> [https://perma.cc/NQ35-XL4D] (reviewing Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017)).

22. 435 U.S. 519 (1978); see *infra* Section I.B.

23. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92 (2015) (citing *Vt. Yankee*, 435 U.S. at 524); see also *Perez v. Mortgage Bankers Association*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/perez-v-mortgage-bankers-association/> [https://perma.cc/ML88-E4V9] (last visited April 1, 2021) (“The D.C. Circuit’s *Paralyzed Veterans* doctrine, which requires agencies to use the notice-and-comment process before it can significantly revise an interpretive rule, is contrary to the clear text of the Administrative Procedure Act’s rulemaking provisions and improperly imposes on agencies an obligation beyond the Act’s maximum procedural requirements.”).

24. See generally sources cited *supra* note 23.

Alaska National Interest Lands Conservation Act in a manner that stripped away the National Park Service's jurisdiction over navigable waters.<sup>25</sup> In 2009, during the early Obama years, the Court interpreted the Indian Reorganization Act in a manner that invalidated the Department of the Interior's long-standing policy of taking land belonging to certain Indian tribes into a trust on those tribes' behalf.<sup>26</sup>

Furthermore, efforts to square agency actions with the Constitution may also lead to judicial intervention in administration. For instance, in 2019, the Court held that the Lanham Act's prohibition on the registration of "immoral" or "scandalous" trademarks violated the First Amendment; in doing so, the Court took away the government's ability to limit viewpoint-based discrimination itself.<sup>27</sup>

Although judicial administration has been on full display lately, by no means is it a recent development. Courts have influenced how agencies act for some time.<sup>28</sup> By many accounts, courts have played a strong role in shaping administrative power since the advent of the modern administrative state,<sup>29</sup> and the term "administrative responsibility" has long been used to describe the organization and operation of both agencies and the courts.<sup>30</sup> In other words, via judicial review, courts have long affected and effected government policies on a regular basis.

What does this Article mean by judicial "administration," precisely? This phrasing does not refer to the traditional notion of the "administration of justice," which includes the frameworks of criminal and civil law implemented within Article III courts.<sup>31</sup> "Administration" encompasses, in a loose sense, all that governmental

25. *Sturgeon v. Frost (Sturgeon II)*, 139 S. Ct. 1066, 1085–87 (2019).

26. *Carcieri v. Salazar*, 555 U.S. 379, 381–82 (2009).

27. *Iancu v. Brunetti*, 139 S. Ct. 2294, 2296 (2019); *First Amendment — Freedom of Speech — Trademarks — Iancu v. Brunetti*, 133 HARV. L. REV. 292, 301 (2019) ("As the government explained at oral argument, striking down the 'immoral or scandalous' bar of the Lanham Act leaves the government without the opportunity to 'restrict trademarks on the ground that they're obscene.'").

28. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 119 (1965) (noting that courts hold a sort of amorphous responsibility to enforce "the enforcement of rights and duties and under broad grants of statutory and 'common law' jurisdiction"). "Modern administrative law relies heavily on the premise that federal agencies are responsive to judicial review." Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1652 (2019). "Judicial review of the basis for administrative decisionmaking is . . . robust, rooted both in core administrative statutes and in constitutionally informed administrative law doctrines." Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1933 (2013).

29. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 16 (1975) (noting that in the mid-1700s "courts had vast coercive power of a criminal, administrative, and civil nature"); *id.* ("In the absence of a bureaucracy, [political] authorities often possessed little coercive power of their own and therefore often had to turn to courts."); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 16 (2017) ("Administrative law did not start with judicial review of administrative activity; the courts were the administrators themselves."); *id.* at 71 (noting W.F. Willoughby's point that courts act as "auxiliary agencies for securing the administration of public law").

30. WILLIAM F. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 9 (1929).

31. *Id.* at 3.



agencies do to implement the law.<sup>32</sup> When either the President or courts engage in “administration,” they are participating, in some sense, in agency action. This Article identifies and examines judicial administration of rulemaking, adjudication, and policymaking that stems from administrative statutory interpretation, which covers a significant portion of what agencies do.<sup>33</sup>

The analogy to presidential administration is imperfect. This Article draws on it for context to explain the dynamics of judicial administration and as a jumping-off point for exploring how the two forms of administration interact, rather than for the purpose of deep comparison. In addition, the analysis is sharpened by revealing both the similarities and the differences between the two.

Presidential administration tends to involve the constitutional power to appoint (and remove) agency heads, as well as via direct mandates like orders, directives, and other forms of presidential guidance.<sup>34</sup> Judicial administration is accomplished through judicial review of agency action. Presidential administration also engages informal mechanisms of oversight, including regulatory review. The

32. “[T]he vast majority of federal activities involve administrative agencies and people when they are conceived and planned as well as when they are performed. . . . Administration is why and where and when and what and how and by whom things are done.” Frederick C. Mosher, *Foreword to THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY*, at viii (Richard J. Stillman II ed., 1989); see also 2 AM. JUR. 2D *Administrative Law* § 46 (2020) (“Administration has to do with the carrying of laws into effect, that is, their practical application to current affairs [that are] . . . administrative in nature.”). The provision of a more precise definition of “administration,” and of clear distinctions between what agencies, courts, Congress and the President do, is far beyond the scope of this Article—it is (and has been) the work of several lifetimes, really.

33. Cary Coglianese, *The Challenge of Regulatory Excellence*, in *ACHIEVING REGULATORY EXCELLENCE* 1, 4 (Cary Coglianese ed., 2017) (describing administrators as rule “appliers” and “enforcers” and as engaging in “a variety of other actions—from educating to subsidizing to adjudicating disputes, all in an effort to solve the problems they have a responsibility to address”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975) (“[T]he traditional model [of administrative law] affords judicial review in order to cabin administrative discretion within statutory bounds, and requires agencies to follow decisional procedures designed to promote the accuracy, rationality, and reviewability of agency application of legislative directives.”). It bears noting that this Article is suggestive and does not claim to be exhaustive. In other words, it offers examples of cases and doctrines that are illustrative of judicial administration, but there are surely other doctrinal frameworks worth considering. One dimension this Article excludes is reviewability of agency inaction. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985).

34. See Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 715–18 (2007) (discussing how the President may legitimately control agencies through appointments, removals, coordination, and “political synergy,” by which the “President’s place as leader of his party and patron of appointees assures strong incentives to follow his wishes”); Shah, *supra* note 1, at 686–88 (describing appointments, removals, and informal consultation such as “shaping the scope and substance of governmental litigation, issuing broad mandates via directed memoranda and executive orders, creating presidential councils, and guiding agencies’ implementation of their statutory mandates” and efforts to coordinate as the main forms of presidential control over executive agencies (citations omitted)); Watts, *supra* note 5, at 685–86 (stating that presidential administration has taken the form of “covert command [and] . . . overt command [such as] . . . issuing written directives and publicly claiming ownership of regulatory policy [in order to] . . . influence or outright control regulatory policy”).

judiciary draws on indirect administration less often, although it does sometimes direct agencies at a remove, rather than administering itself. Examples include instances in which the judiciary appoints special masters or other administrative figures to the federal executive branch<sup>35</sup> or at the level of federal courts to engage in administrative tasks,<sup>36</sup> both in order to serve an investigative or prosecutorial function and/or to ensure that agencies comply with a court's decisions.<sup>37</sup> (While these dynamics also have implications for the formal separation of powers, particularly concerning the boundary between judicial and executive power,<sup>38</sup> this Article excludes them in order to limit its scope.) The President is also interested in taking credit for or holding out (to the public) an agency's actions as his own.<sup>39</sup> Likewise, while judges do not hold press conferences, they are nonetheless more likely to be promoted to the Court if the public can attribute to them certain values that are important to the political sphere.

A prevalent framing of presidential administration, by Peter Strauss and others, distinguishes between two forms of presidential administration.<sup>40</sup> In the first, the President acts as “overseer” of agency action<sup>41</sup> in order to ensure that it is consistent with executive branch norms and the President's agenda. In the second, the President acts as policy “decider” by exercising the authority of the agency officials to whom the power to administer the law has been delegated by Congress.<sup>42</sup> The former is, to many, a comfortably constitutional exercise of presidential

35. See *Ex parte Siebold*, 100 U.S. 371, 397–99 (1879) (holding that court appointment of federal marshals, who are executive officers, is constitutional under the Appointments Clause); *Morrison v. Olson*, 487 U.S. 654, 676 (1988) (alteration in original) (quoting *Siebold*, 100 U.S. at 397) (comparing the Court's interbranch appointment of independent counsel to the “appointment of federal marshals, who are ‘executive officer[s]’”).

36. For example, the Chief Justice has broad authority to appoint administrative support in the judiciary. 28 U.S.C. § 621(a)(1); *id.* § 624; James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125, 1132 (2013) (citing the same statutes in support of the Chief Justice's appointment power).

37. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (upholding the appointment of private attorneys to act as prosecutors in judicial contempt trials); Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 704–06 (2018) (noting that judges often seek to compel agencies to comply with judicial decisions by issuing contempt filings, among other tools).

38. See Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 662 (1978) (arguing that courts violate the separation of powers by “appointing executive and quasi-executive officers responsible to the judiciary and by determining administrative processes in elaborately detailed decrees”).

39. See Kagan, *supra* note 1, at 2250 (discussing how President Clinton sought to take credit for the Food and Drug Administration's anti-tobacco initiatives).

40. Strauss, *supra* note 34, at 696–97.

41. *Id.* at 715–18.

42. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1205 (2013) (describing this model as one in which the President “step[s] directly into the shoes of the relevant official”); Watts, *supra* note 5, at 729 (“Kagan has won. Presidential directive authority with respect to executive agencies is alive and well.”).

power.<sup>43</sup> The latter is more controversial, in that it evinces the President exercising agency policymaking authority despite the delegation of that authority by Congress to agencies themselves.<sup>44</sup> In both cases, the President tends to be motivated by an interest in pursuing her preferred policy interests.

Courts, too, administer the law as overseers and deciders.<sup>45</sup> As to the former, the judiciary oversees the extent to which agency action is consistent with constitutional norms and the legislature's agenda. As to the latter, courts sometimes engage in policymaking themselves. The latter raises the question, similarly raised by presidential engagement in the decider model, as to whether the courts are infringing on the legislature from a formal separation-of-powers perspective. In either case, courts might, like the President, seek particular ends or, unlike the President, seek to further legal values and norms. The line distinguishing overseer from decider does not follow strictly the boundaries between determinations to defer or not or those that separate procedural and substantive review. Rather, the dividing line is, loosely, whether the court is an enforcer of the rule of law or a director of policymaking outcomes.

To be clear, the decider approach to judicial administration is not necessarily more interventionist. Indeed, the judiciary may significantly influence what agencies do while it promotes administrative adherence to constitutional and rule-of-law norms. Thus, even the overseer model may have a great impact on administrative policy outcomes and even appear to nitpick mere procedural defects in order to make substantive policy. The distinction between the two lies, as a theoretical matter, in judicial intent. In the overseer approach, the court seeks to uphold constitutional and other administrative law values. The court's knowledge that this may change the agency's policy outcome is distinct from the court's goal, which is

43. See, e.g., Watts, *supra* note 5, at 730 (suggesting that the President may make "suggestions" that serve "as relevant decisional factors without violating Congress's intent"); Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 490 (2010) (suggesting that "basic supervisory relationships" between the President and agencies could foster more sound policy in a constitutional manner).

44. See Vermeule, *supra* note 42, at 1205 ("On this view, grants of discretion to the heads of executive agencies are presumptively to be read as authorizing presidential direction as a formal legal matter."); Strauss, *supra* note 34 (discussing and arguing against the decider model of presidential administration); Stack, *supra* note 6, at 263 (arguing "the President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name"); Merrill, *supra* note 2, at 1977 (suggesting the decider model of presidential administration relies on a "constitutional order in which the President exercises autonomous policymaking authority without the need for any delegation of power from Congress, at least for the duration of the presidential administration"). *But see* Strauss, *supra* note 34, at 757 (noting that in "the connection of agency priorities as a general matter to the President's program, and the ordinary opacity even of agency judgments about such matters . . . one might find considerably greater room for the presumption of directorial authority for which Dean Kagan and others argue").

45. As Harold Bruff notes, there is a distinction between the judiciary determining "whether the action was selected by fair procedures within constitutional and statutory limits and whether the action was substantively reasonable," and the possibility of courts "supplant[ing] administrative discretion over policy matters by substituting judicial judgment for that of an agency." Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 459.

to ensure compliance with transcendent norms. In the decider approach, the court's interest lies directly in shaping the substance of the precise policy at issue.

This distinction between the two models may be difficult to perceive. Just as Strauss has noted with regard to presidential administration,<sup>46</sup> the overseer model of judicial administration may bleed into the decider model. For instance, in some cases, strong judicial intervention under the overseer approach may appear to be purposivist,<sup>47</sup> a consideration this Article grapples with throughout. Indeed, this tension in judicial administration is reflected by consistent disagreement concerning the extent to which any exercise of judicial review is, in fact, an articulation of policymaking power otherwise assigned to agencies by the legislature or as inherent to agencies' placement in the executive branch.

This Article considers the overseer and decider approaches as they have appeared along two vectors of judicial administration: judicial review that seeks accountability to "due process and rule-of-law values on the one hand" and judicial review that seeks "accountability [to legislative intent] on the other."<sup>48</sup>

The purpose of judicial review of agency procedure has included persuading agencies to adhere to administrative due process<sup>49</sup> and norms of fairness and accessibility in rulemaking,<sup>50</sup> as well as encouraging agency policymaking based in reasoned expertise.<sup>51</sup> In this context, formalist commentators, including on the Supreme Court, have characterized and condemned judicial review as judicial policymaking—in other words, on the grounds that courts have engaged legislative or executive power and thus furthered the decider model of judicial administration.<sup>52</sup> This Article argues that, in contrast, these doctrines remain solidly based in overseer impulses because they are motivated by courts' constitutional duty to ensure fair and adequate process.

The overseer approach has also been the courts' preferred model of reviewing agency statutory interpretation. In this form of judicial administration, courts oversee agency fidelity to legislative intent. And yet this modality, too, allows for the decider approach. Here, too, a court may sometimes adopt the legislative or

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46. Strauss, *supra* note 34, at 704 ("The difference between oversight and decision can be subtle . . .").

47. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1764 (2010) ("Purposivists [endorse] a more expansive judicial role in statutory interpretation, in which courts act in partnership with the legislature in the elaboration of statutory meaning. As a result . . . purposivists generally feel freer to go beyond the confines of statutory text and will not necessarily find that text trumps contradictory evidence of purpose.").

48. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1750 (2007).

49. *See infra* Section I.A.

50. *See infra* Section I.B.

51. *See infra* Section I.C.

52. *See generally infra* Part I.

executive policymaking authority delegated to agencies by making policy decisions itself.<sup>53</sup>

While the decider dimensions of the judicial review of agency procedures have been overstated, they are overlooked today in regard to the judicial control of administrative statutory interpretation. Today's formalists argue for the elimination of *Chevron*<sup>54</sup> and for courts to be installed as the sole arbiters of administrative statutory implementation.<sup>55</sup> Advocacy for this approach signals an unexamined turn toward the decider model of judicial administration, as a systemic matter, but primarily within the context of statutory interpretation. By taking this position, formalists emphasize bolstering the judicial branch, rather than reinstating administrative power in the legislative branch, as would seem to support better the position of those decrying the functional nature of the nondelegation doctrine. In addition, even those formalists who assert that Congress should engage more wholesale in the nuances of regulation may be overlooking the extent to which a seemingly complementary expansion of judicial power could likewise infringe on the legislature in a formalist paradigm of the separation of powers.

Overall, this Article offers a comprehensive framework of judicial administration and explores how this framework bears on the importance of judicial review to the legitimacy of the administrative state. Throughout, the Article threads its account with a discussion of the legal paradigms—including administrative adjudication, rulemaking, hard look review, the nondelegation doctrine, and *Chevron*—that are focal points of Kagan's seminal *Presidential Administration*,<sup>56</sup> among many other articles on the topic. These paradigms have given rise to and continue to shape not only presidential administration, but also, as this Article will illustrate, judicial administration.

This Article does not evaluate whether the cases it discusses were decided correctly. By furthering certain administrative outcomes, judicial administration might hinder the machinery of the administrative state—or improve it, as the case may be. Accordingly, the Article's use of the term overseer or decider for a particular approach to judicial administration is not meant to be complimentary or derogatory,<sup>57</sup> but rather, descriptive.

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53. See *infra* Part II.

54. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

55. See Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988).

56. See Kagan, *supra* note 1, at 2263–83.

57. Cf. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–80 (1982) (using the term “managerial judges” critically). For instance, this Article does not assert that judicial administration is necessarily shaped by underlying political or constitutional ideologies held by the courts, even though it may be. An example of this normative approach is the assertion that anti-administrativists are interested in increasing judicial oversight precisely because it would curb agency action but not agency inaction. See, e.g., Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 499 (2020); Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805 (2019). Another example involves claims of judicial “activism,” a label denouncing judicial review as motivated by goals inapposite to nonpartisan

However, this Article does note that frameworks of judicial administration have normative implications for the ongoing discussion regarding the constitutionality of the administrative state. Some formalists<sup>58</sup> apply the “externalist” account of the administrative state<sup>59</sup> to argue that agencies are illegitimate. More specifically, they contend that agencies are unconstitutional because they exercise discretion in the implementation of law.<sup>60</sup> Furthermore, they often suggest that this discretion should be shifted into the hands of courts to remedy the constitutional transgression.<sup>61</sup>

Functionalists<sup>62</sup> are less troubled by administrative power. These scholars admit that agencies wield a fair amount of clout<sup>63</sup> and that Congress could do more

judicial review. See Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism,”* 92 CALIF. L. REV. 1441, 1471–73 (2004) (defining judicial activism as “judicial legislation”).

58. Those adhering to a formalist approach . . . argue that the key to separation of powers disputes lies in determining whether the challenged action should be characterized as lawmaking, in which case the power is to remain in the province of the legislature; as enforcing the law, in which case it is to remain the prerogative of the executive branch; or as interpreting the law, in which case it falls within the domain of the judiciary. Krent, *supra* note 55, at 1254.

59. Per this view, the expansion of agencies as a result of the New Deal was the result of a political loss for the courts. See Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State, Part I: Political Accommodation and Legal Strategy in the New Deal Era* (Nw. Pub. L. Rsch. Paper, Paper No. 19-03, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3335114](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335114) [<https://perma.cc/9J8S-YFRH>].

60. “This judicial skepticism of administrative government, which [Gillian Metzger has] labeled anti-administrativism, is heavily constitutional, marked by a formalist and originalist approach to the separation of powers [and] a deep distrust of bureaucracy . . .” Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 (2019) [hereinafter Metzger, *The Roberts Court*]. Critics of the administrative state “paint the administrative state as fundamentally at odds with the Constitution’s separation of powers system, combining together in agencies the legislative, executive, and judicial authorities that the Constitution vests in different branches and producing unaccountable and aggrandized power in the process.” Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) [hereinafter Metzger, *1930s Redux*]; *id.* at 34 (noting that anti-administrativists have “a rhetorical and almost visceral resistance to an administrative government perceived to be running amok . . . and a heavy constitutional overlay, wherein the contemporary administrative state is portrayed as at odds with the basic constitutional structure and the original understanding of separation of powers”); see, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2–4 (2014) (introducing his argument that agencies are unconstitutional); Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 205, 206–08 (2016) (arguing that administrative agencies exercise “absolute power” unconstitutionally).

61. “Anti-administrativism” is defined, in part, by “a strong turn to the courts as the means to curb administrative power.” Metzger, *1930s Redux*, *supra* note 60, at 34.

62. “[T]hose adhering to a functionalist view of separation of powers . . . argue that, given the rise of the administrative state, it is impossible to distinguish the branches based on the type of acts they perform. Each branch acts in a variety of ways—making rules, interpreting rules, and applying them in a myriad of contexts.” Krent, *supra* note 55, at 1254–55.

63. See, e.g., Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190 (2011) (“Agencies (and here I include virtually all civil executive branch agencies, bureaus, and departments) typically possess great power.”); Steven Reed Armstrong, *The Argument for Agency Self-Enforcement of Discovery Orders*, 83 COLUM. L. REV. 215, 222–23 (1983) (“For instance, agencies promulgate rules, grant and terminate a variety of government

to articulate clear directives for agencies.<sup>64</sup> Nonetheless, they accept that, by now, the United States and most working governments have conceded to some form of an administrative state to accomplish their goals.<sup>65</sup> This view cares, primarily, that agencies exercise their discretion effectively with the aid of judicial oversight and that the judiciary not interfere with the workings of agencies as a functional matter.<sup>66</sup>

The debate between formalists and functionalists is focused primarily on seeking appropriate boundaries to agency autonomy. However, it neglects to consider whether there are formal limits to the *judiciary's* power over the administrative state, given that agencies are conduits for the legislative and the executive branches. First, both sides assume that courts act only “judicially,” as a descriptive matter, no matter the breadth or tenor of their control over agency policymaking. Second, both take for granted that the Constitution allows for the increase of judicial review ad infinitum to strengthen limits to what agencies can do (even though functionalists disagree as to whether this is advisable as a functional matter).

In contrast to this focus on the limits of administrative activity, this Article contributes a framework for evaluating the contours of, and potential limits to, the *judicial review* of administrative activity. In many ways, this Article reaffirms the “internalist” account of administrative law<sup>67</sup> by arguing that there is legitimacy to agency autonomy vis-à-vis the courts. More specifically, it introduces the idea

benefits, fix rates, grant and deny professional licenses, impose penalties, and terminate employment without prior federal court approval.”).

64. See Gillian Metzger, Stanley H. Fuld Professor of L., Fac. Dir., Ctr. for Const. Governance, Columbia L. Sch., Panel at the 2019 ABA Administrative Law Conference: The Nondelegation Doctrine After *Gundy*: Is the ‘Intelligible Principle’ Standard an Intelligible Principle? (Nov. 14, 2019) (conceding that Congress could be more specific in its delegations, while also noting that there are other tools, like appropriations, investigations and the like, that Congress can use to exercise administrative oversight). But see Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AM. POL. SCI. REV. 666, 669 (1915) (arguing that some legislation is quite specific and that agencies are, in any case, better suited to plan regulatory programs).

65. Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 424 (1894) (“[T]he strength of the government must grow with the expansion of its functions.”); Roscoe Pound, *Executive Justice*, 55 AM. L. REG. 137, 146 (1907) (“Legislatures are pouring out an ever-increasing volume of laws. The old judicial machinery has been found inadequate to enforce them. . . . If we are to be spared a return to oriental justice . . . the profession and the courts must take up vigorously and fearlessly the problem of to-day—how to *administer* the law to meet the demands of the world that is.”).

66. For instance, scholars argue that judicial review may cause ossification in agencies. See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1425–28 (2012) (discussing various functionalist scholars’ views on judicial ossification); see, e.g., Richard J. Pierce Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992). Many also critique courts’ institutional competency vis-à-vis agencies in matters of expertise. *Infra* note 274.

67. This position asserts that the current administrative state developed as a result of incremental doctrinal change, as opposed to merely shifting political winds. For a comprehensive treatment of this view, see Rodriguez & Weingast, *supra* note 59. Note the authors make a cogent argument that neither the externalist nor the internalist view tells the whole story. *Id.*

that—just like the President<sup>68</sup>—courts could overstep their role as a formal matter when behaving as policymaking deciders. In addition, it suggests that the Supreme Court has abdicated its role as overseer of constitutional norms, particularly in acquiescence to presidential administration.

Finally, this Article acknowledges implicitly throughout that Congress's role as overseer and decider is both complementary to, and in tension with, the judicial model this Article explicates. On the one hand, the legislature's claim to the role of overseer has been overstated in many cases, particularly by those who accuse the judiciary of engaging in "judicial activism" when it engages its duty to maintain the requirements of the Constitution. On the other hand, courts' behavior as deciders of statutory meaning obscures the fact that the legislature serves as the foundation of administrative policymaking and that it has the authority to delegate policymaking functions to agencies without garnering outsized intervention from the courts.

This Article proceeds in three parts. Part I offers an account of the judicial administration of agency processes, whereby courts impose procedural requirements to improve compliance with constitutional or other rule-of-law norms. The concerns confronted by this Part include the requirements of due process in agency hearings and adjudication, as sustained by fair and publicly accessible rulemaking and as supported by the quality of agency expertise. Commentators, including the Supreme Court itself, have suggested that judicial review of these matters is a vehicle for judicial usurpation of legislative or executive policymaking. This Part argues that, as powerful as judicial intervention in these cases may be, it is rooted in the oversight model of judicial administration as opposed to a judicial fixation on policy outcomes.

Part II explores the judicial administration of statutory directives. The judiciary's role in this context is founded in the overseer approach as well, in that courts have maintained distance from agency policymaking. However, this Part argues that recent efforts to alter the application of, or eliminate, *Chevron* constitute an affirmation of the decider model of judicial administration. This Part defends its claim on three fronts: first, by suggesting that judicial restraint has historical underpinnings; second, by recounting how *Chevron*, which made explicit the custom of judicial restraint, nonetheless provides ample opportunity for courts to maintain ownership of statutory interpretation; and third, by illustrating, in great depth, how the decider approach to judicial review of the implementation of statutes has come to fruition under an evolving application of *Chevron*. In this way, scholars who

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68. See Strauss, *supra* note 34, at 704–705 (“As in earlier scholarship, my own conclusion is that in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President’s role—like that of the Congress and the courts—is that of overseer and not decider.” (footnote omitted)). “Perhaps a stronger case for the President as ‘the decider’ in ordinary administration arises in contexts where we do not expect judicial review, a developed record for administrative action, relatively formal administrative process, or [Freedom of Information Act] transparency.” *Id.* at 757–59 (discussing topics under the heading “The President as Decider on Issues of Priority”).



discredit the legitimacy of the administrative state do so at the risk of allowing the judiciary to infringe on the very branch, the legislature, that these commentators seek to protect.

Part III concludes the Article by considering how judicial administration impacts the constitutionality of agencies. Just as the decider model of presidential administration does for the President, the decider model of judicial administration allows courts to act in the place of agency administrators. This cautions against uncritical advocacy for the decider model of judicial administration, particularly for those concerned with the legitimacy of the administrative state under a formal separation-of-powers paradigm. After all, from a formalist perspective, courts engaging in the decider model of judicial statutory interpretation are *impermissibly* exercising the policymaking power that has been delegated to agencies by the legislature (notwithstanding formalist concerns with the exercise of legislative power by agencies) or that exists as part of agencies' role in the executive branch. For those interested in judicial intervention as a means of regulating a powerful executive branch,<sup>69</sup> reinforcement of the overseer model of judicial administration would limit potential separation-of-powers repercussions and allow courts to contend with the most pressing problems caused by today's administrative state.

#### I. JUDICIAL ADMINISTRATION OF PROCEDURAL REQUIREMENTS

The President exercises control over processes of administration, both as overseer<sup>70</sup> and as decider.<sup>71</sup> This Part discusses cases in which the judiciary administers agency processes and characterizes these cases as doctrines of oversight. In the process, this Part both marks and refutes a prevalent formalist characterization of these decisions as infringing on the legislature's or agencies' own policymaking domain. None of these are easy decisions to parse, and there are thoughtful arguments suggesting that courts have engaged in policymaking within this paradigm. But the essential judicial motivation underlying these decisions—to oversee the constitutionality and quality of procedure, as opposed to engage in policymaking directly—suggests that these decisions are rooted in the overseer approach.

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69. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2314, 2317 (2006) (referring to the executive branch as the "most dangerous branch").

70. See Krent, *supra* note 2, at 1085 (discussing presidential "management" of administrative adjudication); Bruff, *Presidential Management of Rulemaking*, *supra* note 1, at 533 (examining "presidential oversight" of rulemaking by the Reagan administration).

71. See Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 507 (suggesting that the President "retain[s] the opportunity to resolve ultimate value choices within the alternatives left open by statute"). But see Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967, 984 (1997) (arguing that the "delegations of authority that permit rulemaking are ordinarily made to others, not [the President]—to agency heads whose limited field of action and embeddedness in a multi-voiced framework of legislature, President, and court are the very tokens of their acceptability in a culture of law").

Throughout the modern era, commentators have “switched positions on judicial review, judicial restraint, and the role of the federal courts” with regard to the review of administrative procedures.<sup>72</sup> The passage of the APA was marked by a judicial emphasis on a public choice conception of agencies<sup>73</sup> after years of skepticism toward agency growth that led to the APA in the first place. Once the APA was passed, and for decades after, courts were more likely to “look benignly on agency authority and autonomy.”<sup>74</sup> For instance, during this time, the Supreme Court applied the “arbitrary and capricious” standard of review in a highly deferential way.<sup>75</sup> To some extent, allowing for an expansion of the administrative state was “largely a self-conscious repudiation of legalism” at this time.<sup>76</sup>

But as fits the cyclical nature of judicial review, there began once again a period of heightened judicial interest in ensuring that agencies acted in accordance with procedural and constitutional norms.<sup>77</sup> As Richard Stewart notes, “[t]wo fundamental criticisms” undergirded this rise in judicial involvement in administrative procedure.<sup>78</sup> First, critics of administrative agencies argued that “the limitation of the traditional [judicial review] protections to recognized liberty and property interests is no longer appropriate in view of the seemingly inexorable expansion of governmental power over private welfare.”<sup>79</sup> Second, there was a perception that “agencies have failed to discharge their respective mandates to protect the interests of the public in their given fields of administration.”<sup>80</sup> The judicial corrective to both of these problems required, broadly speaking, a demand

72. Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 215–16 (2019).

73. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043–44 (1997).

74. *Id.* at 1043.

75. See, e.g., *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 180–81 (1935); *Am. Trucking Ass’n v. United States*, 344 U.S. 298, 314–15 (1953); *Abbott Lab’s v. Gardner*, 387 U.S. 136, 143 (1967).

76. “On this view, the appropriate response of the legal system to the rise of administration is one of retreat.” Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2072 (1990) (“New Deal reformers believed that modern problems required institutions having flexibility, expertise, managerial capacity, political accountability, and powers of initiative far beyond those of the courts.”).

77. “[T]he view that law and administration are incompatible has enjoyed a revival—ironically, mostly at the hands of people with little sympathy for regulation in general or the New Deal reformation in particular.” *Id.* at 2073–74. As the court and populace once again became cynical of agencies’ motives, they drew on mechanisms of judicial review to take a more directive role vis-à-vis agencies in order “to ‘perfect’ administrative agencies” so that the various “pathologies” associated with agencies’ public choice motivation could be overcome. Merrill, *supra* note 73, at 1043, 1047; see also Stewart, *supra* note 33, at 1712 (describing the new emphasis of the judiciary on ensuring the “fair representation” of a wide range of affected interests in the process of administrative decision-making). These pathologies included agency capture. Rodríguez & Weingast, *supra* note 2, at 783; Merrill, *supra* note 73, at 1047, 1064–65.

78. Stewart, *supra* note 33, at 1670.

79. *Id.*

80. *Id.*

that agencies adhere better to constitutional expectations of due process and fairness.

First, a period of expansion “took place in the 1960’s and early 1970’s as a result of the consumer, health and safety, and environmental movements,” which meant that more new agencies were created and regulatory activity accelerated.<sup>81</sup> In response, a “populist mistrust of agencies” caused an “upsurge” in judicial intervention in a variety of agency processes.<sup>82</sup> Then, in the 1980s, the beginning of “hard look” review, which was both based in and transformed the APA’s arbitrary-and-capricious standard, saw judicial involvement in the minutiae of administrative expertise. Accordingly, since the mid-twentieth century, courts have invalidated agency policies and otherwise ordered agencies to conduct their actions again with an eye toward shoring up their procedure.

Commentators suggest that judicial mandates to agencies to improve process or evaluate information differently has led to judicial policymaking—in other words, that the judiciary has behaved as a decider for much of this case history. This Part argues, in contrast, that these actions do not (for the most part) stray beyond the formal bounds of judicial authority and are therefore moored in the oversight model. Overall, the overseer model has been the approach of choice for even the most intrusive judicial intervention into agency procedure from the 1960s through today.

This argument is based in a recognition of the judiciary’s primary role in ensuring the constitutionality and quality of administrative process. As Felix Frankfurter once noted, “our administrative law is inextricably bound up with constitutional law.”<sup>83</sup> Agencies “undertake, without prior federal court approval, a number of actions that affect the rights and privileges of individuals”<sup>84</sup>—matters that, as Gillian Metzger notes, go to the heart of constitutional values the judiciary is empowered to protect.<sup>85</sup> Accordingly, a long-standing premise is “that courts play[] a primary role in constitutional interpretation, including determining the constitutionality of agency action.”<sup>86</sup> Furthermore, the Supreme Court’s constitutional mandate also includes the enforcement of rule-of-law norms.<sup>87</sup> As

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81. *A Brief History of Administrative Government*, CTR. FOR EFFECTIVE GOV’T, <https://www.foreffectivegov.org/node/3461> [<https://perma.cc/F7M3-Y2RB>] (last visited April 1, 2021).

82. Merrill, *supra* note 73, at 1064.

83. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927).

84. Armstrong, *supra* note 63, at 222.

85. See generally Metzger, *supra* note 28, at 1897–1900 (discussing actions by federal administrative agencies to interpret and implement the Constitution, including agency elaboration of constitutional principles and the constitutional structure of the administrative state more generally).

86. Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1703 (2019) (disputing this view).

87. Daniel Rodriguez and Barry Weingast note that “the Court’s protection of the rule of law is related to a sense of institutional responsibility to protect rule of law values, a view that perhaps predates the Constitution, but is certainly embedded in our conception of judicial power . . .” Rodriguez & Weingast, *supra* note 59, at 30; see also Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1538 (2018) (arguing that the agencies were created to

Robert Fuchs argued more broadly, functions of agencies include “achieving justice in ordinary human relations [and] adjusting . . . maladjustment between the scope of the problems to be met and the competence of the agencies relied upon for dealing with them.”<sup>88</sup> The judiciary is both uniquely equipped and required to take a substantive approach to reviewing whether agencies are justly implementing the law.

First, this Part suggests that judicial oversight of due process and of the agency adjudication of equal protection matters belongs in the overseer category, despite formalist critiques, because it is concerned with ensuring that agency adjudication complies with constitutional norms, as opposed to effecting a particular outcome. An exception that is perhaps more akin to legislative policymaking is the judicial issuance of *structural* injunctions in response to a finding that an agency violated equal protection law. And yet, despite the legitimacy of judicial oversight for constitutional purposes, the Supreme Court has, as of late, been reluctant to curb executive policymaking on constitutional grounds.

Second, this Part considers both the mid-twentieth century practice in which courts added to APA section 553 rulemaking requirements and the enduring judicial oversight of the notice-and-comment process. Judicial augmentation of rulemaking has been rebuked as legislative policymaking under a formalist model and invalidated under this model by the Supreme Court itself. This Part contends, nonetheless, that these decisions are driven by the same impulses underlying the Court’s more tepid, but still flourishing, practice of invalidating regulations due to inadequate notice-and-comment. More specifically, both sets of doctrine are motivated by the constitutional impulse to ensure fairness in public processes and, therefore, both exemplify the overseer model.

Third, this Part examines ongoing doctrine in which the Supreme Court and D.C. Circuit have applied the APA’s arbitrary-and-capricious standard to take a “hard look” at agency policymaking. Although the arbitrary-and-capricious standard is generally deferential, courts typically demand meaty administrative records under hard look review. Many commentators, formalist and functionalist, have argued that hard look review is outcome oriented and thus is a vehicle for courts to make policy in lieu of agencies. This Part suggests that under hard look review, courts are focused on parsing the influence of politics. More recently, hard look review has been deployed to ensure that the agency merely acted ethically in the face of pressure from the President. Judicial oversight of these dynamics is necessary to maintain a healthy separation of powers. Therefore, hard look review, too, is arguably a doctrine of constitutional oversight, rather than judicial policymaking. In addition, to the extent courts interrogate the development of expertise in agency

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improve the petition process); *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring) (“The history of American freedom is, in no small measure, the history of procedure.”).

88. Ralph F. Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538, 539 (1938).

policymaking under hard look review, they are acting as the overseer of administrative functions that do not, as a constitutional matter, belong to any particular branch of the government.

### A. Agency Constitutionalism

Like presidential administration, judicial administration of due process and other constitutional norms influences agency actions and outcomes. As in other areas of presidential administration,<sup>89</sup> the President controls the form and substance of administrative adjudication through appointment, removal, and other forms of intra-branch management.<sup>90</sup> At times, norms of decisional independence<sup>91</sup> render the President less influential.<sup>92</sup> Nonetheless, administrative law judges have only partial decisional independence,<sup>93</sup> and recent Supreme Court decisions allowing for more political control over administrative adjudicators have begun to deteriorate their insulation further.<sup>94</sup> Accordingly, trends in administrative adjudication may reflect the President's agenda now more than before.<sup>95</sup>

89. See *supra* text accompanying note 36.

90. Krent, *supra* note 2, at 1101.

91. See Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 856 (2015) (suggesting that administrative law judges have significant decisional independence); Ass'n of Admin. L. Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984) ("While the position of an ALJ is not 'constitutionally protected,' in many respects, it is 'functionally comparable' to that of a federal judge." (citations omitted)).

92. "[P]residential direction of administrative adjudication would be seen as an unprecedented exertion of power, violating longstanding unwritten traditions, and would for that reason provoke a storm of protest. . . . Anticipating the risk of this sort of reaction, Presidents will shy away from testing the outer limits of directive authority." Vermeule, *supra* note 42, at 1213. "The only mode of administrative action from which Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers that a department head possesses over an agency's on-the-record determinations." See Kagan, *supra* note 1, at 2306.

93. See Ass'n of Admin. L. Judges v. Heckler, 594 F. Supp. at 1140–41 (noting that while "[t]he APA contains a number of provisions designed to safeguard the decisional independence of [administrative law judges]," and listing these provisions, that "[o]n matters of law and policy, however, ALJs are entirely subject to the agency" (citations omitted)); Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 62 (1979) (noting that ALJs have less decisional independence than Article III judges).

94. See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (holding that administrative law judges of the Securities and Exchange Commission are subject to the Appointments Clause); see also Metzger, *1930s Redux*, *supra* note 60, at 21 ("Whether or not [*Lucia*] ultimately proves successful in court, the mere fact that such a long-established feature of the national administrative state is under question is striking.").

95. For example, commentators have noticed the prevalence of presidential administration in immigration. See, e.g., Bijal Shah, *Civil Servant Alarm*, 94 CHI-KENT L. REV. 627, 642–43 (2019) [hereinafter Shah, *Civil Servant Alarm*] (discussing the furtherance of the Trump administration's goals through policies affecting administrative immigration adjudication); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 576–79 (2018) (discussing presidentialism in immigration under the Obama and Trump administrations); Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 48 (2018) (noting the significant political influence on immigration judges ability to, among other things "carefully consider and deliberate on cases"); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 152–53 (2017) [hereinafter Shah, *Attorney General's Disruptive*

Courts, too, influence administrative adjudication, and this too, without the barrier of agency insulation.<sup>96</sup> However, their focus is on the quality of procedure, unlike that of presidents, who seek adherence to a substantive agenda. Agencies have, in many ways, been “the primary interpreters and implementers of the federal Constitution throughout the history of the United States.”<sup>97</sup> In response, “over the twentieth century . . . courts have cast an increasingly long shadow over the administered Constitution.”<sup>98</sup>

In particular, the mid-twentieth century was a period of heightened judicial interest in ensuring that agencies acted in accordance with procedural and constitutional norms. During this apex of constitutional oversight, the Court pushed agencies to alter their adjudication processes to better comply with due process and a growing equal protection doctrine.<sup>99</sup> These cases have been criticized as judicial engagement in policymaking, sometimes referred to as “judicial activis[m].”<sup>100</sup>

Judicial decisions demanding alternate or additional process in administrative adjudication have no doubt influenced policymaking outcomes. Nonetheless, this Section suggests that the Court has been interested, primarily, in values that are both judicial and constitutional,<sup>101</sup> as opposed to directing policymaking outcomes. One potentially strong exception to this, in which the decider model is arguably prevalent, is reflected in cases where judges have issued *structural* injunctions (remedies) against agencies as a result of finding a constitutional violation—for instance, of equal protection law.<sup>102</sup> In any case, the Court’s interest in overseeing administrative constitutionalism has waned since the mid-1900s.

*Immigration Power*] (considering examples of the political disruption of immigration adjudication from the W. Bush and Obama administrations).

96. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574 (1984) (noting that agency adjudication is beholden to Article III courts).

97. Lee, *supra* note 86, at 1706.

98. *Id.* (“In part, this is because of the well-known expansion of judicial review during this period.”).

99. See *infra* Section I.A.1.

100. See Kmiec, *supra* note 57, at 1447 (noting that the term “judicial activism” originated from the perspective of scholars that “are more skeptical of individual judges’ notions of justice”); Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 926 (1996) (“[A]n activist federal judiciary is inconsistent with the intent of the Constitution and is inherently undemocratic.”); Clint Bolick, *The Proper Role of “Judicial Activism,”* 42 HARV. J.L. & PUB. POL’Y 1, 1 (2019) (defining “judicial activism as any instance in which the courts strike down a law that violates individual rights or transgresses the constitutional boundaries of the other branches of government”). But see *id.* (“[T]he problem with judicial activism is not that there is far too much, but that there has been far too little.”).

101. The development and application of constitutional due process law falls within the judiciary’s mandate more so than any other branch. Indeed, “[t]he President . . . has limited tools for applying the Constitution[, which means that] courts can maintain control over legislative and executive branch constitutional applications.” Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 560–61 (2015).

102. See *infra* Section I.A.2.

### 1. *Overseeing Administrative Due Process*

Presidential administration may violate due process.<sup>103</sup> Judicial administration has sought, in contrast, to strengthen this constitutional norm, sometimes to the detriment of other administrative values. In the 1960s and 1970s, the Supreme Court made efforts to ensure that members of the public whose rights were adjudicated by agencies were allotted adequate due process. These cases were denounced by critics—including dissenting members of the Court, in some cases—as judicial policymaking that overwhelmed the bureaucracy’s own priorities. Nonetheless, this Section labels these instances of judicial administration—in which courts sought to protect constitutional values or confront constitutional violations, however intrusively—as part of the overseer model, because they focus on ensuring fairness in adjudicative processes. Note that this argument is distinct from, but related to, the more common framing of judicial intervention during this time period as responsive, primarily, to judicial and popular distrust of agencies.<sup>104</sup>

The era marked by *Goldberg v. Kelly*<sup>105</sup> is viewed by critics as a period in which due process jurisprudence began to treat “privileges” as open to enforcement by judicial process<sup>106</sup> when before, they had not been.<sup>107</sup> As a result, this judicial engagement was viewed by many as impermissibly legislative and administrative.

In the well-known *Goldberg* case, the Court held that the government’s termination of public assistance payments without a prior evidentiary hearing violated the Due Process Clause of the Fourteenth Amendment.<sup>108</sup> The Court came to this conclusion by framing the government’s main interest as the “uninterrupted” provision of welfare,<sup>109</sup> and by deprioritizing the government’s desire to “conserve[] fiscal and administrative resources.”<sup>110</sup> By emphasizing a constitutional value over the government’s preferred cost-benefit analysis, the Court effectively determined

103. See Shah, *Civil Servant Alarm*, *supra* note 95, at 643 (noting the critique that presidential directives may “infringe on [agency adjudicators’] core responsibility to issue decisions that are unbiased, impartial, expert and well-positioned to withstand judicial review”); Mashaw & Berke, *supra* note 95, at 574, 576 (noting that the President’s “enforcement ramp-up” could infringe on “due process or statutory procedural rights”).

104. See *supra* text accompanying notes 87–90.

105. 397 U.S. 254 (1970).

106. RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 584 (7th ed. 2016) (arguing that “the ‘right-privilege’ distinction began to erode as courts found creative ways to afford procedural protection to untraditional interests”).

107. Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 *YALE L.J.* 1636, 1736 (2007); see also *Bills to Provide for the More Expeditious Settlement of Disputes with the United States, and for Other Purposes: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 76th Cong. 73–74 (1939) [hereinafter *Hearings on H.R. 4236, H.R. 6198, and H.R. 6324, before Subcommittee No. 4 of the House Judiciary Committee*]; see also *id.* at 83–84 (suggesting a presumption against this “assumption”).

108. See *Goldberg v. Kelly*, 397 U.S. at 261.

109. *Id.* at 265.

110. *Id.*

a policy outcome that differed from the agency's preference. Commentators—including the dissent itself—decried the Court's decision as legislative policymaking:

[W]hen federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence my dissent.<sup>111</sup>

In the *United States Department of Agriculture v. Murry*,<sup>112</sup> another case from that time frame, the Court once more imposed requirements of administrative due process that led to changes in the agency's substantive policy. Here, the Court mandated that due process required an administrative policy in which adults, claimed as dependents by individuals not eligible for food stamps, might themselves qualify for food stamps under the Food Stamp Act.<sup>113</sup> In doing so, the Court redirected the agency's initial decision that, as a matter of policy, people supported by nonindigent family members should not receive this type of public assistance.

During this period of judicial activism, the judicial enforcement of due process was consistently critiqued as administrative and legislative policymaking. For instance, Justice Black's *Goldberg* dissent characterizes judicial intervention in due process as policymaking precisely because its focus is on what is fair and humane, which he implies is a concern best suited for the legislature.<sup>114</sup> As in *Goldberg*, the *Murry* decision deprioritized certain bureaucratic interests to uphold justice-based values, which some characterized as policymaking. For instance, Jerry Mashaw argues that *Murry* "illustrates the . . . Court's failure to recognize that different administrative schemes may be based on different models of justice."<sup>115</sup> Instead of allowing the agency to follow a feasible model of "bureaucratic administration," he asserts, the Court in this case dictated it follow a "moral-judgment model of justice" that led to a different policymaking outcome.<sup>116</sup> This view is reflected in the dissent in this case as well, in which four justices "accused the majority of engaging in *Lochner*-esque substantive due process review."<sup>117</sup> Mashaw concludes that "[h]ad the Court recognized . . . the appropriateness of the bureaucratic-rationality model . . . it could have analyzed the *Murry* claim in a more sensible fashion."<sup>118</sup>

And yet, the assessment and maintenance of fairness are key to the judicial

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111. *Id.* at 274 (Black, J., dissenting).

112. 413 U.S. 508, 514 (1973).

113. *Id.* at 508.

114. *See* *Goldberg v. Kelly*, 397 U.S. at 276 (Black, J., dissenting) ("[I]t is obvious that today's result does not depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.").

115. Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 209 (1981).

116. *Id.* at 210.

117. *Id.* at 209.

118. *Id.* at 210.



enforcement of due process, and to the extent agencies are tasked with humanely and justly enforcing the law,<sup>119</sup> it is within the judicial role to ensure they accomplish this mission.<sup>120</sup> In seeking or purporting to be more efficient, agencies may forgo adequate due process. Because of this potential consequence, courts are required to maintain oversight of administrative due process.

Nonetheless, the Court's approach today is far from the interventionist days of *Goldberg*. On the one hand, the Court is open to limiting agency policies in order to protect First Amendment rights, including in a 2019 case condemning the prohibition of "immoral" or "scandalous" trademarks<sup>121</sup> and in a recent case protecting corporate speech,<sup>122</sup> among others.<sup>123</sup> On the other hand, the current standard for due process, as delineated by *Mathews v. Eldridge*,<sup>124</sup> prioritizes the government's interests in efficiency and resource conservation.<sup>125</sup>

Despite its willingness to intervene in the past,<sup>126</sup> the Court has hesitated more recently to curtail executive policymaking power, to the detriment of due process and other constitutional values, particularly in the immigration context. In *Kerry v. Din*, the Court refused to limit the State Department's discretion to deny a visa even to the spouse of a U.S. citizen once the agency claimed a potential threat to national security, a decision that has implications for both due process and the constitutional interest in liberty.<sup>127</sup> And in *Trump v. Hawaii*<sup>128</sup> and *Trump v. Sierra*

119. See McKinley, *supra* note 87 (arguing that the agencies were created to improve the petition process).

120. See *supra* text accompanying notes 83–86.

121. See *supra* text accompanying note 27 (discussing *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019)).

122. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 311 (2010) (holding that under the First Amendment, corporate funding of independent political broadcasts in candidate elections cannot be limited).

123. See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding that mandatory advertising assessments imposed on mushroom producers and handlers under the Mushroom Promotion, Research, and Consumer Information Act violate the First Amendment); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (holding that a ban on displaying alcohol content on beer labels violates the First Amendment); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (holding that a ban on editorializing violates the First Amendment).

124. 424 U.S. 319, 321 (1976).

125. Paradoxically, the *Mathews* factors both overemphasize efficiency and manage to be indeterminate. See, e.g., Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457–68 (1986); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976). In addition, some argue that *Mathews v. Eldridge* "disregard[s] 'process values,' and focus[es] on 'subsidiary issues rather than the essence of the due process guarantee.'" Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1334 (2012) (citing Mashaw, *supra*, at 48; and then citing Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1138 (1984)).

126. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding that neither national security nor separation-of-powers principles allows the executive branch to violate the Fifth Amendment due process of an American citizen by detaining him indefinitely).

127. *Kerry v. Din*, 576 U.S. 86, 91–98 (2015); Adam Liptak, *Justices Weigh Denial of Visa to Husband of U.S. Citizen*, N.Y. TIMES (Feb. 23, 2015), <https://www.nytimes.com/2015/02/24/us/supreme-court-weighs-denial-of-visa-to-husband-of-us-citizen.html> [https://perma.cc/9KAN-NVDZ].

128. 138 S. Ct. 2392, 2400–02 (2018).

*Club*<sup>129</sup>—cases concerning the Muslim travel ban and the wall at the southern U.S. border, respectively—the Court has likewise been reluctant to constrain the President’s plenary power in immigration, choosing instead to bend the norms of constitutional law in order to keep from making policy decisions it considers to be in the President’s domain.<sup>130</sup>

## 2. Policymaking via Structural Injunction

Presidents occasionally reorganize agencies when attempting to deal with a problem or crisis. Examples include the creation of the Environmental Protection Agency, created by President Nixon,<sup>131</sup> and the Department of Homeland Security, created by the second President Bush.<sup>132</sup> Because structuring agencies is a legislative power,<sup>133</sup> agency reorganization initiated by the President is often reinforced by legislation.<sup>134</sup>

A court may also “effectuate the reorganization of an ongoing social institution” by issuing a “structural injunction.”<sup>135</sup> In particular, agency violations of constitutional law may lead to forward-looking, court-issued structural remedies.<sup>136</sup> Unlike presidential reorganizations, however, structural injunctions change how agencies operate without legislative approval. In this way, structural injunctions are arguably legislative in nature and thus perhaps illustrative of the decider model of judicial administration. It bears noting that the focus of the structural injunction, however, is on enforcing constitutional values, as opposed to dictating the substance of administrative policies.<sup>137</sup>

As an initial matter, the judiciary may invalidate administrative policies on a case-by-case basis in order to protect liberty and equal protection.<sup>138</sup> For example,

129. 140 S. Ct. 1 (2019).

130. See *infra* text accompanying notes 511–515.

131. Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1970), *reprinted as amended* in 42 U.S.C. § 4321 note (2006), and in 84 Stat. 2086 (1970) was prepared by President Nixon and approved by Congress.

132. Jonathan Thessin, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 525–26 (2003) (“President Bush proposed and Congress created a department charged with both preventing and responding to terrorist attacks.”).

133. See Shah, *supra* note 3, at 1963–64 (“Congress designs the structure of every agency and administrative subcomponent (although its role in this regard is not exclusive).” (citations omitted)).

134. See, e.g., *supra* notes 131–132.

135. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7 (1978).

136. See Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1993) (“[T]he structural injunction [is] the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution.”).

137. See generally Martin H. Redish, *Constitutional Remedies as Constitutional Law* (Nw. Pub. L. Rsch. Paper, Paper No. 20-21, 2020), <https://ssrn.com/abstract=3669110> [<https://perma.cc/V28D-HX35>] (arguing that, while control of constitutional remedies is generally in the hands of the political branches, such remedies should be viewed as an essential element of the process of judicial review).

138. “The Supreme Court has frequently construed statutes strictly in order to limit the arbitrary power which would otherwise be vested in administrative officials.” *Twice in Jeopardy*, 75 YALE L.J. 262, 316 n.271 (1965) (citing *Kent v. Dulles*, 357 U.S. 116 (1958)); see also Richard H. Fallon, Jr., *Of*

in *Kent v. Dulles*, the Court ruled that while the Passport Office may regulate the travel practices of citizens by requiring them to obtain valid passports, it may not condition the fulfillment of such requirements with the imposition of rules that abridge basic constitutional notions of liberty, assembly, association, and personal autonomy.<sup>139</sup> Here, the Court created limitations on the agency's right to restrict travel, although it soon backed away from this decision.<sup>140</sup>

A few years later, the Court invalidated cost-saving administrative policies in order to improve gender equality.<sup>141</sup> For instance, in *Frontiero v. Richardson*, the controversy involved a Department of Defense requirement that a servicewoman show that her husband is dependent on her for purposes of allowance and benefits, even though the wives of male service members were automatically recognized as dependents.<sup>142</sup> This matter resulted in the Court invalidating the agency's policy because it violated the Due Process Clause of the Fifth Amendment.<sup>143</sup> *Frontiero* has substantive similarities to other cases that concerned the constitutionality of statutes, as opposed to an administrative policy.<sup>144</sup>

As in *Goldberg*,<sup>145</sup> the *Frontiero* decision de-emphasized the government's bureaucratic interests to contend with constitutional concerns. For instance, the Court stated that "although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" <sup>146</sup> It also stated that "'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."<sup>147</sup> In *Frontiero*,

*Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 984 n.376 (1988) ("Courts have often read statutes narrowly 'as a means of restraining the range of agency choice when fundamental individual liberties were at risk.'" (quoting Stewart, *supra* note 33, 1680–81)).

139. *Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it."); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 12 (1982) (noting that, in *Kent*, the agency abridged a constitutional right); see also *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964) (ruling similarly that the State Department may not violate the Fifth Amendment right to travel based on a finding that a passport applicant is a Communist).

140. See *Zemel v. Rusk*, 381 U.S. 1, 7 (1965) (holding that the Passport Act allows the Secretary of State to forbid travel to Cuba by imposing general area restrictions on the issuance of passports); Aranson et al., *supra* note 139, at 18 n.79.

141. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (ruling that the administrators of estates cannot be named in a way that discriminates between sexes); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

142. *Frontiero*, 411 U.S. at 678–80.

143. *Id.* at 690–91.

144. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); see also Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1322–24 (2015) (noting the similarities of *Weinberger* and *Jimenez* to *Frontiero*).

145. See *supra* notes 108–110 and accompanying text.

146. *Frontiero*, 411 U.S. at 690–91 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

147. *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 653 (Warren, J., dissenting)). According to the plurality, "administrative savings does not provide a sufficiently good reason for not treating men and women identically." William R. Engles, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 160 (1985) (emphasis omitted).

like in *Murry*,<sup>148</sup> the Court dictated—for a particular controversy—a model of administration that complied better with the requirements of the Constitution than did the agency's chosen policy.

Around the same time, the Court permitted a structural injunction—that is, a pronouncement aimed at reducing *future* constitutional violations by the government—to correct racial discrimination perpetuated by an agency. In the early 1970s, both the Chicago Housing Authority and Department of Housing and Urban Development (HUD) were found liable for violating the Constitution by selecting public housing sites and assigning tenants based on race.<sup>149</sup> Initially, the district court limited the remedy to within Chicago's city limits.<sup>150</sup> In doing so, the court denied the plaintiff's request for metropolitan area relief that would extend efforts to alleviate segregation practices to the suburbs as well.<sup>151</sup>

In *Hills v. Gautreaux*, the question before the Supreme Court was whether a court could order a general metropolitan area remedy against HUD in response to this particular race-based violation.<sup>152</sup> The Supreme Court did not, itself, direct HUD to implement a metropolitan area remedy in response to the class action decision, but it did find that the lower court had the authority to issue such an order.<sup>153</sup> The Court characterized this approach as allowing “a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without overstepping the limits of judicial power.”<sup>154</sup> This case can be contrasted to *Milliken v. Bradley*, in which the Court determined that a district court's remedy ordering the desegregation of several school districts in Detroit was “wholly impermissible.”<sup>155</sup> However, in *Gautreaux*, the Court said a similar remedy in *Milliken* had been impermissible “not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.”<sup>156</sup>

On the one hand, structural administrative remedies are generally created by agencies themselves.<sup>157</sup> The Court itself has noted that it did not wish “to prescribe the order which [an agency] should enter,” because “the fashioning of the remedy

148. See *supra* notes 115–118 and accompanying text.

149. *Gautreaux v. Chi. Hous. Auth.*, 384 F. Supp. 37, 37 (N.D. Ill. 1974).

150. *Id.* at 38–39.

151. *Id.*

152. 425 U.S. 284, 286 (1976).

153. *Id.* at 306.

154. *Id.* at 301.

155. 418 U.S. 717, 745 (1974).

156. Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 470 (1988) (quoting *Hills v. Gautreaux*, 425 U.S. at 296).

157. Louis L. Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720, 744 n.69 (1946) (noting the “general doctrine of the administrative power to determine the remedy”); *Id.* (remarking that Judge Learned Hand “believed . . . that the courts are forbidden ‘to disturb the measure of relief which [the administrative agencies] think necessary’” (alteration in original)).

is a matter entrusted to the [agency], which has wide latitude for judgment.”<sup>158</sup> Justice Scalia argued that “by ‘turning judges into long-term administrators of complex social institutions,’ structural reform remedies ‘require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials.’”<sup>159</sup>

Furthermore, “[t]he structural injunction frequently is viewed as an illegitimate judicial foray into legislative or executive terrain.”<sup>160</sup> As to the former, there has developed a literature criticizing structural injunctions on the basis of both formalist<sup>161</sup> and functionalist<sup>162</sup> criteria. Even commentators with an expansive conception of the judiciary’s formal power have suggested that courts do not have an “unregulable power to issue structural injunctions.”<sup>163</sup>

On the other hand, the Court has the authority to foster administrative adherence to constitutional values like equal protection. As an initial matter, the Court may legitimately empower an agency to enforce a particularized remedy to a violation of statutory civil rights law.<sup>164</sup> More to the point, the judiciary’s primary goal in issuing structural injunctions is to halt unconstitutional administration,<sup>165</sup>

158. *FTC v. A.P.W. Paper Co.*, 328 U.S. 193, 203–04 (1946).

159. James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57, 110 (2012) (citing *Brown v. Plata*, 563 U.S. 493, 555 (2011) (Scalia, J., dissenting)).

160. Janet Koven Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. MARSHALL L. REV. 57, 61 (1994) (discussing *Gautreaux*); see also Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1289 (1983); Donald L. Horowitz, *The Judiciary: Umpire or Empire?*, 6 LAW & HUM. BEHAV. 129, 136 (1982) (“In the shaping of new rules to govern a variety of institutional settings, courts have been engaged in legislation without the benefit of a legislative process.”).

161. See Nagel, *supra* note 38, at 663 (characterizing a Supreme Court case, *In re Debs*, in which the federal judiciary issued and enforced a structural injunction, as the Court “assum[ing] for itself the authority to share Congress’ plenary power to regulate interstate commerce” (footnote omitted)). “*In re Debs* represents judicial approval of an unusually dangerous combination of functions in the federal courts.” *Id.* at 681 (footnote omitted).

162. A fair portion of this critique is focused on the inability of judges to manage complex institutional reform. See, e.g., E. Garrett West, *A Youngstown for the Administrative State*, 70 ADMIN. L. REV. 629, 653 (2018); Robert E. Easton, Note, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983, 1991 (1990); Robert A. Katzmann, Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513, 514–16 (1980); see also DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 47–48 (1977).

163. Calabresi & Prakash, *supra* note 1, at 579 n.142 (“Lessig and Sunstein assert that our construction of the Executive Power Clause leads to the conclusion ‘that the judicial branch has a wide range of inherent and (legislatively) unregulable judicial authority beyond that enumerated and granted by Congress.’ . . . We disagree. Our theory does not inexorably lead to the conclusion that broad and unregulable ‘inherent’ judicial powers must exist, such as, for example, an unregulable power to issue structural injunctions.”).

164. See, e.g., *W. v. Gibson*, 527 U.S. 212, 223 (1999) (holding that the Equal Employment Opportunity Commission has authority to award compensatory damages against another agency that violated the Civil Rights Act).

165. See Easton, *supra* note 162, at 1983 n.1 (“[The structural injunction] usually finds its justification in the more open-ended constitutional provisions, such as the equal protection or due process clauses.”).

not to engage in the substance of future policymaking. Indeed, the structural injunction was considered a defensible, if not necessary, remedy for furthering the constitutional values inherent in school desegregation.<sup>166</sup> Courts can also choose to promulgate structural remedies with deference to the other branches<sup>167</sup> to reduce offense to the separation of powers. Finally, as a practical matter, the structural injunction is a remedy of last resort<sup>168</sup> and “necessarily require[s] government officials to take affirmative steps.”<sup>169</sup> Therefore, “they can be extremely difficult to implement when those officials are unwilling to cooperate,”<sup>170</sup> which may render courts overseers, as a matter of fact, rather than deciders.

### *B. Augmenting Informal Rulemaking Requirements*

The President influences the regulatory process,<sup>171</sup> generally through a centralized review process.<sup>172</sup> The White House Office of Management and Budget (OMB), “which reviews executive agencies’ proposed and final regulations as well as their regulatory plans, [allows the President to] exert aggressive . . . control over agency rules.”<sup>173</sup> A central tension in this context is the need for the President to exercise control over her branch while simultaneously allowing agencies to engage in rulemaking that reflects legislative intent.<sup>174</sup> Accordingly, Harold Bruff advises a case-by-case approach to identifying whether presidential involvement in rulemaking intrudes on legislative turf.<sup>175</sup>

166. See Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1108 (1984). There is a significant body of literature on this topic that is beyond the scope of this Article.

167. See Nagel, *supra* note 38, at 719–21.

168. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 189 (1983) (arguing that structural injunctions be as unrestrictive as possible); Easton, *supra* note 162, at 1991 (“Varying levels of injunctive relief—including, as a last resort, the structural injunction—should be pursued only when less intrusive means fail.”).

169. Karla Grossenbacher, Note, *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO. L.J. 2227, 2229 (1992).

170. *Id.*

171. “Rulemaking . . . is not immune to outside intervention and instead is open to the influence of persons outside the agency . . . including the President.” Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 454 (footnote omitted).

172. “White House review of agency rules is the initial mechanism that Presidents developed to exert control over the rulemaking apparatus.” Watts, *supra* note 5, at 689 (footnote omitted). While regulatory oversight has existed since the Carter administration, President Reagan was the first to authorize the Office of Management and Budget to oversee agencies’ rulemaking processes. *Id.* at 689–91. Indeed, Elena Kagan’s classic example of presidential administration involves President Clinton taking the reins from the Food and Drug Administration to initiate a rulemaking on tobacco regulation. Kagan, *supra* note 1, at 2282–83.

173. Watts, *supra* note 5, at 685.

174. “The President needs enough power to execute the laws effectively; yet he must not destroy the essential balance of power among the branches of the government.” Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 452.

175. See, e.g., *id.* at 473–74, 495 (arguing that “[t]he President should have his broadest authority over rulemaking in the military and foreign affairs areas. . . . [and that e]mergencies should also justify relatively drastic presidential action”).

Courts, too, administer rulemaking. In the mid-twentieth century, courts began to force agencies to add procedural mechanisms to rulemaking, such as oral argument or an ex parte communication bar, in order to put meat on the bare bones of the APA.<sup>176</sup> Today, the Court has displayed a willingness to invalidate a regulation by deeming the underlying process to be insufficient under the APA<sup>177</sup> and thereby requiring the agency to promulgate the rule with somewhat more formality. This Section considers both the former period of judicial augmentation of the regulatory process and the more hands-off—but nonetheless, impactful—judicial administration of the notice-and-comment process that occurs today.

Many formalist critics, including the concurrent Supreme Court in some cases, characterized the former practice as both legislative and an intrusion into agency policymaking—in other words, as indicative of the decider approach to judicial administration—and thus beyond the scope of judicial power. This Section argues, however, that these decisions were based in the judicial impulse to ensure fairness and public accessibility and are therefore exemplative of the overseer model. Today, courts are restrained to a determination of whether agencies have complied with minimal rulemaking requirements, as opposed to obliging more. And yet, although the current doctrine of judicial administration of rulemaking fits safely into the overseer model, it has nonetheless invalidated significant administrative policies.

“Beginning in the late 1960s . . . judges on the Court of Appeals for the District of Columbia Circuit—with considerable support from the surrounding political and academic communities—decided that the procedures for informal rulemaking provided by the APA were inadequate” to stem agency capture.<sup>178</sup> Accordingly, the early 1970s saw a spat of cases requiring added procedures designed to improve the quality of rulemaking.<sup>179</sup> For instance, in *Portland Cement Ass’n v. Ruckelshaus*, decided in 1973, the D.C. Circuit struck down proposed rules based on the agency’s failure to disclose the scientific data on which the rules were based.<sup>180</sup> Moving forward, courts began to expect agencies to “expose[] to the view of interested parties for their comment” any “scientific material which is believed to support the rule,” particularly if a scientific decision is the basis for the proposed

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176. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1439 (2004) (noting that “in the mid-1960s and 1970s, courts reshaped the requirements that an agency had to satisfy if it relied on notice-and-comment rulemaking”).

177. See, e.g., *supra* notes 20–21 and accompanying text.

178. Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 857 (2007).

179. *Id.* at 857; see also John E. FitzGerald III, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 ADMIN. L. REV. 287, 289 (1974) (noting, in the mid-1970s, that “[f]lexibility in fitting administrative procedures to particular functions [was] . . . crucially important in evaluating the Administrative Procedure Act”).

180. 486 F.2d 375, 401–02 (D.C. Cir. 1973); see also *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d. Cir. 1977) (making a similar decision as *Portland Cement* in the Second Circuit).

rule.<sup>181</sup> In addition, the *Home Box Office, Inc. v. FCC* case, decided in 1977, was the apex of a judicial requirement prohibiting ex parte communication in informal rulemaking.<sup>182</sup> Overall, requirements of the time included

notices of proposed rulemaking that disclose[d] to the public all relevant evidence possessed by the agency; the use of oral proceedings, cross-examination, and discovery when deemed appropriate by the court; comprehensive statements of basis and purpose that respond in technical detail to all important points raised by outside parties during the rulemaking; and prohibitions on ex parte agency contacts with outside parties, agency predetermination of important issues, and substantial deviations between the proposed and final rules.<sup>183</sup>

Some debate the common law implications of this time frame.<sup>184</sup> Others have discussed whether the judicial augmentation of rulemaking procedures contradicts the APA<sup>185</sup> and noted its functional implications.<sup>186</sup>

Still others contend that courts behaved, in these cases, in a legislative or administrative capacity. Indeed, the Supreme Court itself characterized the augmentation of administrative procedure as both legislative<sup>187</sup> and “administrative”<sup>188</sup> in the famous *Vermont Yankee* case<sup>189</sup>—that is, as engendering a decider approach to judicial administration. Put another way, according to *Vermont Yankee*, courts were hiding the exercise of administrative common law

181. *N.S. Food Prods.*, 568 F.2d at 252; see also Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 537–39 (2018) (arguing that this practice contradicted the text of the APA).

182. 567 F.2d 9, 57 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829.

183. Beermann & Lawson, *supra* note 178, at 857.

184. See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 181–89 (1998).

185. See, e.g., Kovacs, *supra* note 181, at 532–44 (arguing, among other things, that requiring agencies to show scientific evidence contradicted the text of the APA); Beermann & Lawson, *supra* note 178, at 857 (contending that, at the time, “the lower federal courts essentially rewrote the APA’s notice-and-comment rulemaking provisions”).

186. See, e.g., Kovacs *supra* note 181, at 544–65.

187. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978); see also Beermann & Lawson, *supra* note 178, at 858; *id.* at 901 (“*Vermont Yankee* violations . . . have an important feature in common: they all apply a judicial model to what Congress conceived of as a legislative process.”).

188. The Court asserts not only that “[a]gencies are free to grant additional procedural rights in the exercise of their discretion,” and that “administrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” *Vt. Yankee*, 435 U.S. at 524, 543 (citations omitted); see also Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 460 (noting that the Court was concerned that “without [the] restriction on the judiciary” articulated by *Vermont Yankee*, “unwarranted judicial intrusion into agency decisionmaking could usurp the political authority of the agencies to set policy”).

189. The Court also had functional concerns about the practice. Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 460 (noting that “the Court worried that enlarged judicial supervision of challenged agency actions would unduly restrict all agency choice of rulemaking procedures [and that] retroactive judicial imposition of special procedures in some cases could force agencies to act defensively by adopting maximum procedures in every case”).



behind the veil of judicial statutory interpretation, in particular, of the APA section 553's notice-and-comment requirements.<sup>190</sup>

Furthermore, *Vermont Yankee* adopted a formalist view by declaring that it exceeds the limits of judicial power to require agencies to implement rulemaking procedures beyond those made explicit by Congress or those that agencies have decided to implement themselves.<sup>191</sup> "The *Vermont Yankee* decision reasserted a conception of the APA as an ordinary statute which does not allow for the exercise of such authority."<sup>192</sup> In doing so, the Court declared that courts cannot "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."<sup>193</sup> While subsequent decisions have suggested that courts may still engage in careful interpretation of the APA,<sup>194</sup> at least one current Supreme Court Justice advocates for a complete moratorium on the practice.<sup>195</sup>

Notably, the Supreme Court might not have had such a restrictive approach to presidential administration of rulemaking. Bruff argues that "[h]ad the *Vermont Yankee* Court considered presidential review of agency rulemaking . . . it might have articulated a relatively broad scope of executive supervision of regulatory practices."<sup>196</sup> He suggests, further, that to the extent "*Vermont Yankee* restricts the oversight function of the federal courts on the grounds that they lack the authority to affect policy decisions, one of the political branches may appropriately assume the initiative, thereby reducing pressure on the courts to step beyond the limits of traditional judicial review."<sup>197</sup>

As a general matter, there is merit to the idea that the political branches, particularly the legislature, should guide rulemaking. Not only do regulations exist to implement legislation with some precision, but rulemaking processes also mimic legislative decision-making, which suggests that the legislature should play a pivotal

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190. 5 U.S.C. § 553.

191. *Vt. Yankee*, 435 U.S. at 524 (declaring that APA section 553 "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them" (footnote omitted)). The Court asserts, in addition, that "the court improperly intruded into the agency's decisionmaking process" and "[n]either the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency." *Id.* at 525, 555 (citation omitted).

192. Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 184 (1983).

193. *Vt. Yankee*, 435 U.S. at 549.

194. See, e.g., *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008) (declaring that the agency must place, in the rulemaking record, unredacted versions of studies on which it relied).

195. *Id.* at 246–47 (Kavanaugh, J., dissenting) (arguing that the *Portland Cement* doctrine, which requires that agencies disclose the studies and data upon which their rules are based particularly when the matters are scientific, "cannot be squared with the text of § 553 of the APA," which suggests that it is inconsistent "with the text of the APA [and] *Vermont Yankee*" (citations omitted)).

196. Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 460–61.

197. *Id.* at 461.

role in structuring them. That having been said, *Vermont Yankee* somewhat obscures the constitutional reasoning behind the judicial approach it rebuked. Fairness through ample notice, the right to participate in public processes, regulated procedure, and procedural transparency are due process values.<sup>198</sup> This suggests that the augmentation of rulemaking requirements is a valid exercise of the judiciary's responsibility to uphold the Constitution. Even in *Vermont Yankee*, which advocated deeply for administrative autonomy, the Court nonetheless declared that "agencies 'should be free to fashion their own rules of procedure'" *only* "[a]bsent constitutional constraints."<sup>199</sup>

There is evidence that this was the case here. In the D.C. Circuit decision overturned by *Vermont Yankee*, the court notes that the "primary argument advanced by the public interest intervenors is that the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process."<sup>200</sup> Therefore, as Cass Sunstein has suggested, "the controversial decision of the D.C. Circuit in the *Vermont Yankee* case amounted to an insistence on procedural safeguards" and thus, "ought not to be understood as a usurpation of legislative or executive prerogatives."<sup>201</sup> Like the discussion on enforcement of due process in administration adjudication discussed earlier in this Part, judicial review that bolsters due process in rulemaking has some basis in the overseer model of judicial administration. Still, as reaffirmed by *Perez v. Mortgage Bankers*,<sup>202</sup> the Court has since restrained the judiciary from augmenting rulemaking requirements.

Nonetheless, the Court has continued to administer rulemaking via review of the notice-and-comment processes across administrations. Despite remaining squarely in the role of overseer, the Court has invalidated policies that were created

198. See Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 693 (2007) (highlighting constitutional values of "public administration [including] . . . fairness to affected interests through advance notice [and] broad rights of participation in the rulemaking process"); *id.* (noting additional constitutional constraints associated with the "regularity of process and transparency . . . and enforcement and management norms" (footnote omitted)).

199. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543 (1978) (citations omitted).

200. *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Reg. Comm'n*, 547 F.2d 633, 643 (D.C. Cir. 1976), *rev'd sub nom.*, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519.

201. Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J.L. & PUB. POL'Y 51, 52–53 (1984).

202. See *supra* text accompanying note 24; *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015) (rejecting nearly twenty years of D.C. Circuit precedent, encapsulated by *Paralyzed Veterans of America*, to hold that notice and comment is not required when an agency alters an interpretive rule with a new interpretive rule); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); see also Beermann & Lawson, *supra* note 178, at 860 (arguing that *Vt. Yankee* can be read, today, to "forbid imposition of any administrative procedures not firmly grounded in some source of positive statutory, regulatory, or constitutional law").

by agencies at the behest of both Presidents Obama<sup>203</sup> and Trump.<sup>204</sup> The decisions in these cases did not hinge on whether the President's exercise of power was excessive but, rather, on a determination that the policies, while spearheaded by the President, lacked the notice-and-comment process required by everyday regulation.<sup>205</sup> It is remarkable that, despite the very limited role of judicial engagement in rulemaking post-*Vermont Yankee*, the Court has delegitimized policies with significant presidential imprimatur by deciding that they violate the minimal expectations of the APA. This set of cases exemplifies how interventionist the overseer approach to judicial administration can be.

### C. "Hard Look" Review

Presidents may choose to influence agency expertise<sup>206</sup> or to defer to it.<sup>207</sup> On the one hand, Kagan has argued that when the President has taken an active role in administrative decision, courts should reduce their intensity of review under hard look doctrine.<sup>208</sup> Some scholars suggest that presidential involvement can improve agency expertise by making it more accountable to public values<sup>209</sup> and that insulation more generally interferes with the President's constitutional authority to exert control over his branch.<sup>210</sup> On the other hand, presidential influence can deteriorate the neutrality of agency expertise,<sup>211</sup> for instance, by swaying it toward political interests; accordingly, this view suggests that deference to independent agency expertise can "ameliorat[e] potential problems with presidential administration."<sup>212</sup>

203. See *supra* text accompanying note 21 (discussing the DAPA case, *United States v. Texas*, 136 S. Ct. 2271 (2016)).

204. See *supra* text accompanying note 20 (discussing *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019)).

205. See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804.

206. "The Bush administration, for example, demonstrated a behind-the-scenes willingness to influence agencies' scientific findings." Watts, *supra* note 5, at 685 (footnote omitted).

207. Daniel A. Farber, *Presidential Administration: Then and Now*, 43 ADMIN. & REGUL. L. NEWS 4, 5 (2017) (pointing out that Kagan noted in her article that President Clinton deferred "to agency staff on scientific matters").

208. Kagan, *supra* note 1, at 2372, 2380–83.

209. See generally Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733, 746–47 (2018) (arguing for the improvement of executive oversight of independent agency policymaking).

210. See Calabresi & Prakash, *supra* note 1, at 599 (arguing that any agency insulation interferes with the President's constitutional power).

211. See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612 (2010) ("Independence was traditionally justified, particularly during the New Deal era, as promoting expertise." (footnote omitted)).

212. Farber, *supra* note 207, at 5 ("Kagan viewed President Clinton's deference to agency staff on scientific matters as a significant factor in ameliorating potential problems with presidential administration."); see also STEPHEN BREYER, *BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION* 55–63 (1993) (arguing for a "depoliticized regulatory process," that experts should play a large role in policymaking and that there are "inherent" benefits to expertise and insulation from politics); Bruff, *supra* note 43, at 489 (suggesting that the President should exercise his appointments

Still, others argue a middle ground.<sup>213</sup> In this vein, some suggest that presidents should be able to foster agency independence if it serves them.<sup>214</sup> Others contend that while agencies may legitimately be swayed by politics, courts should not privilege presidential administration of expertise in arbitrary-and-capricious review.<sup>215</sup>

Likewise, courts administer expertise—in particular, through the doctrine of “hard look.” Hard look review is based in Louis Jaffe’s exhortation that courts take on a more significant role in reviewing administrative agency action.<sup>216</sup> Soon after *Vermont Yankee* was decided,<sup>217</sup> the doctrine of hard look arose. From the 1980s until today, courts have engaged in hard look review, by which they interrogate agencies’ development and application of expertise. Hard look review “subjects agency reasoning processes that underlie significant policy decisions, to a heightened form of rationality review”<sup>218</sup> under APA section 706(2)(A)’s arbitrary-and-capricious review, which is otherwise a deferential standard.<sup>219</sup> Hard look doctrine has evolved the arbitrary-and-capricious standard into a stronger review of the agency’s record and may entail judicial involvement in the minutiae of administrative policymaking. As Cass Sunstein says, “[t]he judicial role has manifested itself most prominently in the development of ‘hard look doctrine.’”<sup>220</sup>

*State Farm* is widely understood as establishing hard look review.<sup>221</sup> After administrative and legislative proceedings, the National Highway Traffic Safety

power “to select regulatory officers who understand and appreciate the boundary between expertise and policy,” allow “experts who are not in political positions to communicate their views on science and policy to Congress and the public . . . , [and] limit the number of prompting directives”).

213. For instance, Cass Sunstein has suggested that “presidential supervision is likely to be an important supplement to judicial review, serving some of the functions of the hard look doctrine without being subject to its risks.” Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 487 (1987).

214. See Metzger, *supra* note 28, at 1928–29 (suggesting that agency independence may in some cases even benefit a president’s agenda); Bressman & Thompson, *supra* note 211, at 631 (suggesting that “the President may seek a degree of independence to make credible a commitment to address a long-term problem”); cf. Shah, *supra* note 3, at 2008–13 (arguing that Congress may foster agency independence to improve fidelity to legislative directives).

215. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1839–42 (2012); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 197 (2012).

216. See generally JAFFE, *supra* note 28; Daniel B. Rodriguez, *Jaffe’s Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1160 (1997) (characterizing Jaffe as “the intellectual architect of hard look review”).

217. See *supra* Section I.A.

218. Richard W. Murphy, *The Limits of Legislative Control over the “Hard-Look,”* 56 ADMIN. L. REV. 1125, 1126 (2004).

219. Sunstein, *supra* note 213, at 463–65, 470–72 (1987) (noting that hard look is a deferential standard that considers whether agencies have used illegitimate or irrational factors while developing policies); see also cases cited *supra* note 75 (listing examples of cases in which courts have applied the arbitrary and capricious standard in a deferential manner).

220. Sunstein, *supra* note 213, at 463.

221. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (“An agency’s view of what is in the public interest may change, either with or without a change in

Administration (NHTSA) issued Motor Vehicle Safety Standard 208 in 1977, which mandated the phasing in of passive restraints on vehicles—either automatic seat belts or airbags.<sup>222</sup> The automobile industry geared up to comply.<sup>223</sup> Then, in 1981, after President Reagan entered the White House, the new Secretary of NHTSA reopened the rulemaking, received written comments, held public hearings, and ultimately rescinded the passive restraint requirement.<sup>224</sup>

In *State Farm*, the Court evaluated whether the agency's rescission of the seat belt requirement was based in expertise. The Court declared that its scope of review under the arbitrary-and-capricious standard is "narrow and a court is not to substitute its judgment for that of the agency."<sup>225</sup> Furthermore, the Court notes that field studies regarding auto safety are "precisely the type of issue" that is primarily within agency expertise and "upon which a reviewing court must be most hesitant to intrude."<sup>226</sup> Nonetheless, the Court picked apart the agency's decision<sup>227</sup> and ultimately decided that the agency's rescission of the rule was arbitrary and capricious.

Hard look review "continues to this day unabated," which some note with criticism.<sup>228</sup> For instance, hard look has been criticized from a functionalist perspective as a mechanism for the Court to substitute its own, inferior judgment for that of the agency.<sup>229</sup> Moreover, both formalists and functionalists view hard look as allowing the Court to make policy decisions on the agency's behalf.<sup>230</sup>

circumstances. But an agency changing its course must supply a reasoned analysis . . ." (citation omitted)); see also Sunstein, *supra* note 192, at 210 ("The *State Farm* decision expressly endorses the primary elements, both substantive and procedural, of the hard-look doctrine."); Peter L. Strauss, *Considering Political Alternatives to Hard Look Review*, 1989 DUKE L.J. 538, 539 (1989) ("[I]n *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* . . . the Court essentially endorsed 'hard look' review.").

222. *State Farm*, 463 U.S. at 34–37.

223. *Id.* at 38.

224. *Id.* at 39.

225. *Id.* at 43.

226. *Id.* at 53.

227. For instance, the Court suggested that even if seatbelts were wanting, NHTSA completely failed to consider an alternative of airbags; determined that the agency is too quick to dismiss the benefits of detachable seat belts (and therefore, that the agency does not adequately consider consumer inertia); and declared that the agency did not articulate a basis for not requiring non-detachable, "spool out" seat belts. *Id.* at 48, 54–55 ("At very least, this alternative way of achieving the objectives of the Act should have been addressed and reasons given for its abandonment."); *id.* at 52–53 (claiming "there is no direct evidence" supporting the agency's finding that automatic seatbelts will not improve safety); *id.* at 55 (arguing that the emergency release on spooling seat belts seems as successful as those on detachable belts); see also Sunstein, *supra* note 192, at 196–97.

228. Beermann & Lawson, *supra* note 178, at 859, 881–82 (noting disapproval from scholars such as Paul Verkuil).

229. See, e.g., Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983) ("Courts cannot take a hard look at materials they cannot understand nor be partners to technocrats in a realm in which only technocrats speak the language.").

230. See, e.g., Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 558 (1985) (using *State Farm* as an example of when "hard look review [has] permit[ted] a court to substitute its judgment for the agency's on the pretext of determining whether a policy outcome is 'reasonable.'")

Indeed, the formalist view that hard look review allows the judiciary to engage in legislative policymaking drives Paul Verkuil's suggestion that there be a "*Vermont Yankee IP*" to curb this doctrine.<sup>231</sup>

It is difficult to distinguish between judicial oversight and purposivism in this doctrine. Mere supervision of the development of expertise may appear indistinguishable from the exercise of policymaking power and may also have a significant impact on policy outcomes.<sup>232</sup> Furthermore, requiring agencies to bulk up rulemaking records to justify decisions based in administrative expertise could, in fact, be a reflection of the court's policymaking interests. In any case, hard look doctrine entails judicial involvement in the minutiae of administrative policymaking; in this way, it certainly serves administrative policymaking, if not replaces it.

This Section asserts, however, that hard look doctrine fits into the overseer model of judicial administration, at least as a theoretical matter. First, it argues that hard look doctrine focuses on calibrating the influence of politics on policymaking, as opposed to the substance of policymaking outcomes. Ultimately, by allowing courts to monitor the impact of politics on agency decision-making, hard look review allows judicial oversight of administrative fidelity to the mandates of

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(footnote omitted)); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 549 (1997) ("To advocate hard look review in the context of the courts' prescriptive substantive review function is really to advocate greater discretion on the part of judges to substitute their views of appropriate statutory policies and analytical methodologies for those of the agency."). In regards to *Massachusetts v. EPA*, Ronald Cass suggests that the Court's views on the causes and importance of climate change impacted its decision to require the Environmental Protection Agency to regulate carbon dioxide and other greenhouse gases as pollutants. Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. BRIEF 75, 75 (2007) ("In their eagerness to promote government action to address global warming, the Justices stretch, twist, and torture administrative law doctrines to avoid the inconvenient truth that this is not a matter on which judges have any real role to play."); see also *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007) (holding that the agency's action was arbitrary and capricious because it had offered no reasoned explanation for its refusal to decide whether greenhouse gases caused or contributed to climate change); *id.* at 500 (noting the "enormous potential consequences" of the EPA's actions to stem global warming, that a "reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere," and that the "Court attaches considerable significance to EPA's espoused belief that global climate change must be addressed").

231. Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 418–19, 423–24 (1981); see also Beermann & Lawson, *supra* note 178, at 859 (noting that Verkuil drew on "*Vermont Yankee* as a broad symbol—a metaphor of sorts—for Supreme Court intervention to rein in undue lower-court interference with agency discretion and autonomy"). For a discussion of *Vermont Yankee*, see *infra* Section I.B.

232. Sunstein, *supra* note 213, at 471 (describing hard look as the revitalization of "[a]n aggressive judicial role"); Rodriguez & Weingast, *supra* note 2, at 783 ("Without doubt, judicial intervention through the 'hard look' doctrine made an enormous impact on administrative policymaking, an impact depicted in a large contemporary literature on administrative law.").

structural constitutionalism,<sup>233</sup> even if it curtails presidential administration as a result.<sup>234</sup>

Second, this Section contends that hard look doctrine is rooted in the judicial supervision of agency expertise, which is distinct from legislative policymaking as a matter of custom. This Section makes this claim on the basis of public administration scholarship that describes the development of expertise as belonging to neither political branch, not even the legislature, and thus is legitimately within the domain of the judiciary. As a result, while the development of expertise bears on policymaking, the two are distinguishable. In keeping with this idea, hard look review does not generally, as an empirical matter, lead to an agency changing its policy.<sup>235</sup> One reason for this may be that, despite the specter of the court's disapproval, the final decision-making authority rests with the agency.<sup>236</sup>

### 1. *Overseeing Political Influence in Expertise*

The Court has long wrestled with whether presidential and political influence on agency expertise is justifiable. A key goal furthered by hard look review is identification of the appropriate level of agency responsiveness to the President's agenda. In other words, courts have focused, in hard look doctrine, on whether policymaking outcomes have been unduly influenced by political interests, as opposed to encouraging any particular outcome. In this way, the judiciary has acted as overseer, seeking to ensure that there is a balance of political and technocratic factors shaping administrative policymaking.

Despite the outstanding view of *State Farm*<sup>237</sup> as purposivist,<sup>238</sup> its most substantive contribution was the idea that "agencies should explain their decisions

233. Sunstein, *supra* note 192, at 198 (arguing that hard look review is "a judicial check," which "ensur[es] that agencies stay within the bounds set by Congress and guard[s] against arbitrariness[, is] an important, if imperfect, means of fulfilling some of the purposes underlying the original constitutional structure"); Sunstein, *supra* note 201, at 53 ("[A]ggressive posture of courts reviewing administrative action ought not to be understood as a usurpation of legislative or executive prerogatives, but as a way for the courts to reclaim some of their prior decision making authority, and at the same time to promote, rather than impair, the original purposes of the separation of powers.").

234. See Sunstein, *supra* note 201, at 53 (suggesting further that "the concern about judicial usurpation of executive authority, albeit legitimate, is insufficient to justify rejecting the current form of hard look").

235. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 396 (2000) ("[J]udicial review in the D.C. Circuit under the hard look version of the arbitrary and capricious standard generally did not significantly impede agencies in the pursuit of their policy goals during the decade under review. In many cases, regulatory programs continued despite successful hard look challenges to particular agency rules.").

236. For instance, "*State Farm* . . . require[d] only reconsideration by the agency and d[id] not order the passive restraints rule into effect." Sunstein, *supra* note 192, at 210–11 (noting that, because it may not change outcomes, hard look is "peculiarly vulnerable to the conventional challenge that it will serve only to produce needless formality").

237. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); *supra* notes 221–227 and accompanying text.

238. See *supra* notes 230–231 and accompanying text.

in technocratic, statutory, or scientifically driven terms, not political terms.”<sup>239</sup> For instance, while Ronald Cass suggests that the Court’s views on the causes and importance of climate change impacted its decision in *Massachusetts v. EPA*,<sup>240</sup> Harold Bruff argues that the “Court’s unusually aggressive supervision of EPA in *Massachusetts* seems to be due to the majority’s belief that the agency was ignoring its own scientific record, which pointed strongly in favor of regulation, in favor of presidential policies that did not directly answer the statutory command.”<sup>241</sup>

Some approve of the judiciary acting as arbiter of political influence on agency policies,<sup>242</sup> and others disapprove.<sup>243</sup> Of the former, some are concerned that the Court has chosen *not* to apply hard look when the agency has acted in response to political pressure.<sup>244</sup> These scholars suggest that even policy changes in response to political influence should remain beholden to the expectations of hard look review.<sup>245</sup> Of those who decry hard look limitations on political factors, some argue

239. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2010) (emphasis omitted); see also Sunstein, *supra* note 213, at 470–71 (“The disagreement [in *State Farm*] . . . stemmed from contrasting views about the proper role of politics in the regulatory process.” (footnote omitted)).

240. See Cass, *supra* note 230.

241. Bruff, *supra* note 43, at 462–63 (“In essence, the Court was willing to prod the EPA to regulate based on its own view of the science of climate change, whatever the President might think. The Court never explicitly claimed that it was better suited than the President to make such a judgment, but its holding certainly implied such a view.”); see also Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens’s Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1061–62 (2010) (arguing that the Court’s purposivism constituted adherence to legislative intent).

242. Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 497 (2019) (arguing, contrary to some scholars, that “when an agency is acting pursuant to a presidential directive, its decisions require more, not less, scrutiny”); Sunstein, *supra* note 192, at 211 (“The technocratic rationality required by *State Farm* and similar decisions should be understood as a device, admittedly highly imperfect, for reducing the risk that agency decisions will result from ‘political’ considerations that are sometimes illegitimate and that at any rate ought not to be concealed.”).

243. See Watts, *supra* note 239, at 2 (arguing that arbitrary and capricious review should privilege certain forms of political influence on agency decision-making); cf. Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1324 (1992) (arguing that allowing judges to “interfere with particular outcomes in the absence of constitutional or like instructions, simply on the grounds that political processes may have been inadequate, is inviting the whirlwind”).

244. For instance, in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), *vacated*, 567 U.S. 239 (2012), the Court’s view that politics should be allowed to influence agency policies may have buoyed its decision to allow the agency to abandon a rule without an explanation for the change. See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1399 (2018); Short, *supra* note 215, at 1811; Watts, *supra* note 239, at 22 (“In upholding the FCC’s orders, Justice Scalia’s opinion . . . seems to make it easier for agencies to change their policies due to changes in the political landscape.”).

245. See *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)), *rev’d*, 138 S. Ct. 1134 (2018); see also Buzbee, *supra* note 244, at 1400–01 (detailing how *Encino Motorcars* reinforced the requirements of hard look for policy changes).



that presidential influence on agency policies should encourage deference to agencies.<sup>246</sup>

While acquiescence to the President may be the Court's general inclination today,<sup>247</sup> it has placed some limits on administrative capriciousness resulting from presidential administration. For instance, in *Department of Homeland Security v. Regents of the University of California*,<sup>248</sup> the Court invalidated the 2017 rescission of the Deferred Action for Childhood Arrivals (DACA), accomplished at the urging of the Trump administration.<sup>249</sup> According to the Court, the agency acted in an arbitrary and capricious manner because it took action based on a memorandum<sup>250</sup> that was not adequate to justify its action.<sup>251</sup> Although the agency eventually supplemented its reasoning, the Court concluded that this supplement was made after the action was taken and therefore could not be relied upon to justify the prior action.<sup>252</sup> As Ben Eidelson notes, the Court's refusal to accept post hoc rationalization is a "turn toward an accountability-forcing brand of arbitrariness review"<sup>253</sup>—and that too, one the Court makes despite the accountability ostensibly fostered by the President's interest in the rescission of the DACA program.

Furthermore, in *Department of Commerce v. New York*, the Court recently engaged in hard look review, initially to determine whether the President's influence on the agency's decision was permissible.<sup>254</sup> However, the Court ultimately upheld

246. Watts, *supra* note 239, at 2 (arguing that courts should allow agency policies that are responsiveness to "public values" espoused by the President to pass arbitrary and capricious review); Kagan, *supra* note 1, at 2380 (arguing for an approach that "relax[es] the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question").

247. See *infra* notes 508–519 and accompanying text.

248. 140 S. Ct. 1891 (2020).

249. Adopted by the Department of Homeland Security under President Obama, the DACA Memorandum established a process and agency-wide criteria for deferring removal for certain noncitizens "who came to the United States as children." Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., and John Morton, Dir., U.S. Immigr. & Customs Enft (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/JJ2V-JSPA>].

250. *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, U.S. DEP'T HOMELAND SEC. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/9TD7-7M46>].

251. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. at 1910 (noting that the Secretary of the Department of Homeland Security "failed to consider . . . important aspect[s] of the problem," per the requirements of *State Farm*).

252. *Id.* at 1908–09.

253. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. (forthcoming Spring 2021), <https://scholar.harvard.edu/files/beidelson/files/reasoned-explanation.pdf> [<https://perma.cc/K7RL-PM6H>]. But see Stephen Lee, *DACA and the Limits of Good Governance*, REG. REV. (July 29, 2020), <https://www.theregreview.org/2020/07/29/lee-daca-good-governance/> [<https://perma.cc/J5TG-2BXF>] (arguing that the Regents decision is "narrow" and "illustrates the limits of the good governance rationale in the context of ongoing struggles . . . to expand immigrant rights").

254. See *supra* text accompanying notes 7–12 (discussing *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)).

a lower court decision setting aside the Secretary of Commerce's decision to add a citizenship question on the 2020 Census because the Secretary's expressed justification was pretextual<sup>255</sup> and thus unavailable for "meaningful judicial review."<sup>256</sup>

While much of Chief Justice Roberts's majority opinion treated the Commerce Secretary's decision "as a perfectly reasonable and historically grounded policy choice,"<sup>257</sup> the decision ultimately found that the Secretary "had lied."<sup>258</sup> This meant he put forth "'contrived reasons [that] defeat the purpose' of courts requiring agencies to provide reasoned explanations for their actions."<sup>259</sup> As the Chief Justice explained, "[i]f judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."<sup>260</sup>

Despite this clear reprobation of the agency's record, the Court did not determine that the decision failed arbitrary-and-capricious review,<sup>261</sup> although Justice Breyer noted in his concurrence that he and three other Justices would have held this as well.<sup>262</sup> Instead, the Court's decision in this case was focused, distinctly, on the agency's integrity, which is usually not the explicit concern of the arbitrary-and-capricious standard.<sup>263</sup> However, as Gillian Metzger argues, arbitrary-and-capricious review "serves to identify pretextual decision making"—for instance, in the seminal *State Farm* decision.<sup>264</sup> *State Farm* "did not put its holding in terms of pretext."<sup>265</sup> "[I]nstead[, *State Farm*] conclud[ed] that the agency was not acting reasonably to achieve its safety goals. However, an implicit corollary of concluding that an agency's policy undercuts its stated goals is that those goals probably weren't really motivating the agency in the first place."<sup>266</sup>

255. Dep't of Com. v. New York, 139 S. Ct. at 2575 (concluding that "the decision to reinstate a citizenship question cannot adequately be explained in terms of DOJ's request for improved citizenship data to better enforce the [Voting Right Act]," and thus that the agency's explanation "is incongruent with what the record reveals about the agency's priorities and decisionmaking process").

256. *Id.* at 2573.

257. Metzger, *The Roberts Court*, *supra* note 60, at 26.

258. *Id.* at 27.

259. *Id.*

260. Dep't of Com. v. New York, 139 S. Ct. at 2576.

261. *See id.* (remanding the matter to the agency).

262. *Id.* at 2584 (Breyer, J., concurring) ("I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire [but] . . . write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA).").

263. Metzger, *The Roberts Court*, *supra* note 60, at 33 ("It's true that arbitrary and capriciousness review does not usually speak in terms of pretext and the Supreme Court had not previously held agency action arbitrary and capricious on pretext grounds." (footnote omitted)). *But see id.* at n.147 (noting that in *Texas v. United States*, 809 F.3d 134, 171–76 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016), the court of appeals applied the arbitrary and capricious standard to uphold "the district court's determination that the justification given for Department of Homeland Security's [DAPA] program was 'pretext'").

264. *Id.* at 33.

265. *Id.*

266. *Id.*

Arguably, in both *State Farm* and *Department of Commerce*, the Court engaged in the overseer model of administration, by seeking to ensure merely that the policy was supported by the agency's purported goals, as opposed to a policy that was responsive only to shifting political winds. That having been said, *Department of Commerce* effectively quashed the government's decision to add a citizenship question to the Census, in part because any subsequent justification would be equally post hoc.<sup>267</sup> Here, we see the potential for the Court to engage significantly in administration without making policy itself, in order to arbitrate the proper influence of politics on agency decision-making.

## 2. *Supervising the Development of Expertise*

Hard look review is, fundamentally, oversight of the processes of agency expertise.<sup>268</sup> Despite the consideration of political factors in *State Farm*, this and other cases serve as examples of hard look review emphasizing the importance of expertise.<sup>269</sup> Many claim that hard look allows courts to substitute their own judgment, and impose their own policymaking preferences, on agencies.<sup>270</sup> This Section argues that expertise-building is distinct from legislative policymaking as a matter of custom. More specifically, progressive scholarship from political science and public administration suggests that the development, substantiation, and application of expertise is not ascribed to either political branch of the government, not even the legislature. Certainly, figures like Frank Goodnow and Woodrow Wilson acknowledged that agencies settle value questions and engage in political issues. But they nonetheless distinguished between the administration of exercise and policymaking, despite the endless interaction between the two.<sup>271</sup>

The legitimacy of agencies derives, in part, from the extent to which they are differentiated from political actors and have developed unique expertise.<sup>272</sup> The

267. See *supra* notes 13–14 and accompanying text.

268. “One fundamental doctrine of judicial review, hard look review, both privileges expertise and has been found to improve the quality of administrative adjudication, in part because of its emphasis on the evaluation of agency process.” Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REGUL. 279, 347–48 (2017) (footnotes omitted).

269. *Id.* at 347 n.330 (listing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 627 (1986), and *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105–06 (1983), as examples of hard look focused on expertise); see also Sunstein, *supra* note 213, at 470–71 (“The majority [in *State Farm*] treated the issue [of politics] as if it were simply one of the application of expertise to the problem.”); Sunstein, *supra* note 192, at 196.

270. See *supra* notes 229–231 and accompanying text.

271. “[T]he responsibility of administrative agencies to popular control was a value taken-for-granted; the responsiveness of administrators and bureaucrats was not seen as a problem because everyone then understood that politics and policy were separate from administration, which was concerned exclusively with the execution of assignments handed down from the realm of politics.” Wallace S. Sayre, *Premises of Public Administration: Past and Emerging*, 18 PUB. ADMIN. REV. 102, 103 (1958).

272. DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 14–15 (2001); see

“science” of administration (which includes matters of internal agency organization and management), substantive scientific knowledge, and technocratic skills are all characterized as expertise. Since the New Deal, agencies have been responsible for the development and implementation of expertise while administering the law,<sup>273</sup> and they were favored for this purpose over judges as a functional matter.<sup>274</sup> That having been said, agencies’ responsibility to administer expertise does not stem from the legislative delegation of policymaking power.

In the late 1800s, around the time the first modern agency was created, commentators asserted that administration and politics—that is, the workings of bureaucracy and of the legislature—are in fact separate and that the former is located only in agencies,<sup>275</sup> as opposed to Congress. One expectation of the modern agency was that it would engage in the work of “administration,” separate from what politicians do. In 1887, Woodrow Wilson noted, about the “province of administration,” that “[m]ost important to be observed is the truth . . . insisted upon by our civil service reformers; namely, that administration lies outside the proper

also DAVID H. ROSENBLUM, *PUBLIC ADMINISTRATION AND LAW: BENCH V. BUREAU IN THE UNITED STATES* 18 (1983) (characterizing expertise as an “independent” power of agencies for the formulation and implementation of public policy).

273. See James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 364 (1976) (“Those who rationalized the New Deal’s regulatory initiatives regarded expertise and specialization as the particular strengths of the administrative process.”).

274. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23 (1938) (noting that agencies, unlike judges, develop expertise “from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem”); *Am. Airlines, Inc. v. Civ. Aeronautics Bd.*, 359 F.2d 624, 632–33 (D.C. Cir. 1966) (rejecting a challenge to an agency policy in part because it concerns “the kind of issue where a month of [agency] experience will be worth a year of [judicial] hearings”); Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1682, 1721 (2015) (arguing generalist courts cannot effectively review scientific determinations from expert agencies). Critiques that courts lack the expertise to oversee agencies date back to before the APA. See, e.g., *Hearings on H.R. 4236, H.R. 6198, and H.R. 6324, before Subcommittee No. 4 of the House Judiciary Committee, supra* note 107 (statement of Hon. Harold L. Ickes, Sec’y, Department of the Interior) (arguing that courts have less expertise than agencies); *A Bill to Prescribe Fair Standards of Duty and Procedure of Administrative Officers and Agencies, to Establish an Administrative Code, and for Other Purposes; A Bill to Revise the Administrative Procedure of Federal Agencies: To Establish the Office of Federal Administrative Procedure: To Provide for Hearing Commissioners: To Authorize Declaratory Rulings by Administrative Agencies: And for Other Purposes; and A Bill to Provide for the More Economical, Expeditious, and Just Settlement of Dispute with the United States, and for Other Purposes: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the S. Comm. on the Judiciary*, 77th Cong. 173 (1941) (statement of Charles V. McLaughlin, Assistant Sec’y of Labor, Department of Labor) (arguing that increased judicial review would allow the judiciary to “substitute[e] its own judgment in legislative and executive matters for the qualified opinion of an expert body set up by Congress”); Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L.J. 577, 581, 596–98 (1938) (arguing that courts, like Congress, do not have the expertise or competence to administer the law).

275. See, e.g., FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT* 10–11 (1900). See generally Leonard D. White, *Public Administration, in* RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT’S RESEARCH COMMITTEE ON SOCIAL TRENDS 1391 (1934) (discussing increased centralization, efficiency and expertise in the administrative state). Ernst Freund, who favored a “centralized, bureaucratic method of organizing administration,” looked to Europe as a model. POSTELL, *supra* note 29, at 181–82.

sphere of *politics*.”<sup>276</sup> Wilson remarked further that “[a]dministrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.”<sup>277</sup>

At the turn of the twentieth century, scholars “contended that there were ‘two distinct functions of government’”<sup>278</sup>: as Frank Goodnow put it, “[p]olitics[, which] ‘has to do with policies or expressions of the state will,’ [and] administration[, which] ‘has to do with the execution of these policies.’”<sup>279</sup> Nicholas Henry suggests this view was based in the view that “the legislative branch, aided by the interpretive abilities of the judicial branch, expressed the will of the state and formed policy, while the executive branch administered those policies impartially and apolitically.”<sup>280</sup> Public administration was associated with unique scientific principles that both centered “in the government’s bureaucracy”<sup>281</sup> and had no particular locus in any constitutional branch, including the political branches.<sup>282</sup> For today’s purposes, this suggests that an agency’s development of expertise is separate from legislative policymaking.<sup>283</sup>

Complementarily, scholars also noted a lack of constitutional constraints to the development of administrative expertise. Ernst Freund distinguished the work of administration from that of the legislature and the judiciary on constitutional terms,<sup>284</sup> while Wilson claimed that “the field of administration . . . at most points

276. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 210 (1887).

277. *Id.*

278. Nicholas Henry, *Paradigms of Public Administration*, 35 PUB. ADMIN. REV. 378, 379 (1975).

279. *Id.*

280. *Id.* (“Separation of powers provided the basis of the distinction . . .”).

281. The emphasis of this paradigm was on “locus—where public administration should be.” *Id.* “[I]n the view of Goodnow and his fellow public administrationists, public administration should center in the government’s bureaucracy.” *Id.*

282. See W. F. WILLOUGHBY, *PRINCIPLES OF PUBLIC ADMINISTRATION* (1927); see also Foote, *supra* note 198, at 693 (noting that fundamental precepts of public administration include “the use of expertise to run programs; the development of a full administrative record to ensure reasonable decision-making; and enforcement and management norms”); Wilson, *supra* note 276, at 211 (“A great deal of administration goes about *incognito* to most of the world, being confounded now with political ‘management,’ and again with constitutional principle.”); *id.* at 212 (noting that statutory law and the Constitution, which properly concern themselves with the development of “general law,” are not administrative and that only “the detailed execution of such plans is administrative”).

283. Ross, *supra* note 101, at 530 (noting, in the twentieth century, “a general belief about the separation of the administration of law from politics, reinforced by the image of . . . expert bureaucrats controlling agency actions”); *id.* at 530 n.45 (citing work by Lisa Bressman and Mark Seidenfeld that identifies “the early twentieth century dominance of the ‘expertise’ model of administrative law in which agencies through their expertise were considered ‘better positioned to produce sound regulation and good government than elected officials’”); see also Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1286 (2014) (“As for history, the sort of judicial review that the presumption favors—appellate-style arbitrariness review—was not only unheard of prior to the twentieth century, but was commonly thought to be unconstitutional.”).

284. Freund, *supra* note 65, at 404 (noting that administrative law “regulates and limits governmental action without involving constitutional questions. Its subject matter being the administration of public affairs, as distinguished from legislation on the one side and from the jurisdiction of the courts on the other, it has been aptly called administrative law”).

stands apart even from the debatable ground of constitutional study.”<sup>285</sup> Goodnow also interrogated the assumption that public administration necessarily had “constitutional moorings.”<sup>286</sup> Such thinkers have categorized the administration of expertise as “extra-constitutional.”<sup>287</sup>

As is well known, early in the twentieth century there arose tension between the concept of administration as purely focused on science and information gleaned through expertise, and its potential to be political; indeed, the APA was passed as a symbol of the growing mistrust of administrative power.<sup>288</sup> Accordingly, some social scientists progressed to the belief that public administration, on second thought, cannot be divorced from politics.<sup>289</sup> Nonetheless, some of the same group of scholars suggested that, as a theoretical matter, agencies still act outside the scope of politics, despite their adjacency to the political branches.<sup>290</sup> Likewise, government agencies themselves argue, perhaps unsurprisingly, against the judicial supervision of expert agency tribunals.<sup>291</sup> Arguably, the development of agency expertise lies outside of the sphere of politics. For this reason, the judiciary may feasibly engage with this set of administrative responsibilities, as it has under the doctrine of hard look review, without acting as a policymaking decider, from a formal separation-of-powers perspective.

285. Wilson, *supra* note 276, at 209–10.

286. See Ralph Clark Chandler, *Dual Sources of American Administrative Legitimacy*, 7 *DIALOGUE* 1, 7 (1984). This is not to say that there are no valid constitutional concerns associated with agencies’ pursuit of information. See, e.g., Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 *YALE L.J.* 1111, 1111 (1947) (arguing that agencies’ investigatory powers may harm “constitutional principles concerning privacy, searches and seizures, self-incrimination, and freedom from bureaucratic snooping”).

287. GUSTAVUS A. WEBER, *ORGANIZED EFFORTS FOR THE IMPROVEMENT OF METHODS OF ADMINISTRATION IN THE UNITED STATES* 3–5 (1919) (noting a shift in political science literature, toward the recognition of the need for technical, “extra-constitutional agencies” to further the tasks of government “efficient[ly] and economical[ly]” (emphasis added)); Wilson, *supra* note 276, at 211 (“There is [a] distinction between constitutional and administrative questions . . .”).

288. See *infra* text accompanying notes 364, 366.

289. See John M. Gaus, *Trends in the Theory of Public Administration*, 10 *PUB. ADMIN. REV.* 161, 168 (1950) (“A theory of public administration means in our time a theory of politics also.”); Sayre, *supra* note 271, at 103 (expressing skepticism of agencies as a result of the perceived involvement of administrators in politics); *id.* at 104 (“Public administration is one of the major political processes.”).

290. See, e.g., Sayre, *supra* note 271, at 102–03 (arguing that administration is concerned primarily with “[o]rganization theory,” that is, challenges associated with “the necessities of hierarchy, the uses of staff agencies, a limited span of control, [and the] subdivision of work by such ‘scientific’ principles as purpose, process, place, or clientele”); see also Herbert A. Simon, *A Comment on “The Science of Public Administration,”* 7 *PUB. ADMIN. REV.* 200, 200–01 (1947) (suggesting that public administration remained separate from politics and comprised expertise—in particular, two types: a “pure” science of administration and the prescriptive decision-making required to issue public policy).

291. See *Hearings on H.R. 4236, H.R. 6198, and H.R. 6324, before Subcommittee No. 4 of the House Judiciary Committee*, *supra* note 107, at 107 (statement of Hon. Stephen B. Gibbons, Assistant Sec’y, Treasury Department) (noting that in the debates leading to the APA, the Department of War argued that “courts are in no position to supervise the exercise of discretionary authority by these specialized tribunals except in those cases where there is a clear abuse of power or authority”).

Finally, the functional perspective on judicial control of expertise parses the matter differently. On the one hand, there are functional reasons to allow agencies to maintain primary control over the development and evaluation of information.<sup>292</sup> On the other hand, for those concerned with the technical failings of agencies,<sup>293</sup> there is impetus to give power to courts in this domain.<sup>294</sup> A growing functional distrust of agencies could be alleviated by a greater emphasis on hard look. More intense judicial involvement in the development of agency expertise could push agencies to maintain a better quality of expertise despite pressure from the President to give short shrift to policies based in independent scientific data.

For instance, in regard to the Affordable Clean Energy Rule,<sup>295</sup> some have called the new policy “alarming,”<sup>296</sup> and others suggest that it evinces poor or obscure scientific reasoning on the part of the Environmental Protection Agency.<sup>297</sup> Accordingly, the Court should scrutinize the agency’s development and application of expertise under hard look. Furthermore, to maintain consistency with

292. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011) (arguing “that courts ought to be at their ‘most deferential’ when reviewing an agency’s scientific determinations,” as “is supported by basic notions of institutional competence and . . . a natural judicial tendency to avoid any deep confrontations with science” (footnote omitted)); see also *supra* note 274 and accompanying text. Judicial restraint may allow an agency the autonomy to maximize its own, targeted resources and permit a fuller expression of the policy, while minimizing the burden on courts, which are tasked with a more generalized mandate. Furthermore, it may be misguided to draw on ever-increasing procedure, and in particular judicial review, as the basis for administrative legitimacy and accountability. See generally Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

293. See, e.g., MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955) (arguing that agencies atrophy and become subject to capture); THEODORE LOWI, *THE END OF LIBERALISM* (1969); Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 874–75 (1973) (noting that Congress often fails to give agencies enough guidance in the development of expertise).

294. Indeed, despite Judge Leventhal’s earlier enthusiasm for agency expertise, he eventually became convinced that courts should be part of the administrative, record-building process. Compare *Am. Airlines, Inc. v. Civ. Aeronautics Bd.*, 359 F.2d 624, 632–33 (D.C. Cir. 1966) (rejecting a challenge to an agency policy in part because it concerns “the kind of issue where a month of [agency] experience will be worth a year of [judicial] hearings”), with *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970).

295. See *supra* text accompanying notes 16–20 (discussing Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60)).

296. Lincoln L. Davies, Tyler Hubbard & Christopher Sanders, *Trump, Energy Policy, and Hard Look Review* 21-2 (Ohio State Pub. L. Working Paper, Paper No. 504, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3454533](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3454533) [<https://perma.cc/MG4S-9ZQK>].

297. See Jessica Wentz, *Four Important Points About EPA’s Affordable Clean Energy Rule*, COLUM. L. SCH.: CLIMATE L. BLOG (June 20, 2019), <http://blogs.law.columbia.edu/climatechange/2019/06/20/four-important-points-about-epas-affordable-clean-energy-rule/> [<https://perma.cc/MQ2G-Q8DN>] (suggesting that the “EPA revised its methodology to downplay the public health impacts and costs of replacing the CPP with the [Affordable Clean Energy] Rule”); Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES (May 20, 2019), <https://www.nytimes.com/2019/05/20/climate/epa-air-pollution-deaths.html> [<https://perma.cc/P65Y-H52G>].

*Massachusetts v. EPA*,<sup>298</sup> the Court would be advised to push back against the agency's similar reasoning here—that regulatory rescission effected by the Affordable Clean Energy Rule is required, because otherwise the agency would exceed its jurisdiction under the Clean Air Act.<sup>299</sup>

## II. JUDICIAL ADMINISTRATION OF STATUTORY DIRECTIVES

The President's involvement in administrative statutory interpretation is controversial.<sup>300</sup> This is because the President is rarely delegated direct power to implement a statute. Rather, Congress generally allots the authority to implement legislation to agencies (or, to be precise, to agency heads). Accordingly, Kevin Stack argues that the President should not be allowed to exercise the discretion to interpret statutes that has been delegated to an agency, as opposed to the President herself.<sup>301</sup>

Courts, too, influence the outcomes of policymaking by taking control of administrative statutory interpretation. Unlike the President, however, the judiciary has a privileged role in administrative statutory interpretation. Furthermore, also somewhat unlike the President,<sup>302</sup> courts have uncontested power to issue directives that legally bind agencies.

Part I noted that, in the past, the judicial review of agency processes was characterized, in effect, as part of the decider model of judicial administration and argued that the overseer dimensions of this paradigm have been overlooked. The instant Part argues that the opposite is true today in regard to the judicial administration of statutes. Just as *Chevron*<sup>303</sup> is a doctrine of judicial restraint, the current trend rebuking *Chevron* reinforces the decider model of judicial administration, in which judges “step directly into the shoes” of the agency head<sup>304</sup> and exercise policymaking power delegated to agencies.

This Part leans into the debate between formalists and functionalists regarding *Chevron* and the extent to which neither considers seriously that there may be limits to judicial review. It does not argue that judicial statutory interpretation is

298. See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007) (holding invalid the agency's argument that it was not authorized to regulate carbon dioxide and other greenhouse gases as pollutants under the Environmental Protection Act).

299. Wentz, *supra* note 297 (noting that the “EPA asserts the [Clean Air Act] does not grant [authority for the CPP] on the basis of the plain meaning, structure, and legislative history of the [Act],” and that “[n]otably, EPA has tried this very move before—and lost before the Supreme Court [i]n *Massachusetts v. EPA* (2007)”).

300. “American public law has no answer to the question of how a court should evaluate the president's assertion of statutory authority.” Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 539 (2005).

301. See generally *id.*

302. See generally Strauss, *supra* note 34 (discussing and contesting the President's authority to issue binding directives on—that is, to make decisions on behalf of—agencies).

303. See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

304. *Cf. Vermeule, supra* note 42, at 1205 (discussing Kagan's model of presidential administration as that of the President “step[ping] directly into the shoes of the relevant official”).



illegitimate, especially from a functionalist perspective. However, it does suggest that formalists, in particular, cannot argue for judicial primacy in this arena without considering the extent to which this approach encourages the judiciary to infringe on the authority of the other branches of government per formalists' own conception of the separation of powers.

Certainly, courts have a mandate to ensure that agencies' interpretations of statutes comply with constitutional expectations and legislative intent. Courts' power to review agency actions arises from the conference of "original jurisdiction of all civil actions under the Constitution,"<sup>305</sup> and from organic statutes with explicit provisions for judicial review, including the APA.

To the extent agencies "apply the Constitution through statutory interpretation,"<sup>306</sup> courts have the power to attend to constitutional matters implicated by these interpretations.<sup>307</sup> Courts are particularly justified in maintaining control over administrative statutory interpretation when doing so is necessary to manage a constitutional matter, such as preservation of the First Amendment<sup>308</sup> or application of the Supremacy Clause,<sup>309</sup> although constitutional implications may obscure the fact that the Supreme Court ultimately engaged in more pedestrian statutory interpretation.<sup>310</sup> Administrative law is centered as well on judicial "interpretations of the statutes establishing the agencies,"<sup>311</sup> although the judiciary's role in this regard was not inevitable.<sup>312</sup> Shaping administrative policy through the

305. 28 U.S.C. § 1331. Administrative statutory interpretation is particularly judicial when it involves interpreting a statute in a way that prevents its enforcement by the agency from being unconstitutional. *See, e.g.,* *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 307 (1924) (refuting the Federal Trade Commission's interpretation of the Federal Trade Act because the agency interpretation was in violation of the Fourth Amendment).

306. Ross, *supra* note 101, at 561.

307. *See* Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1674 (2019) (suggesting that the canon of constitutional avoidance limits *Chevron* deference to agencies).

308. *See, e.g.,* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190–91, 195–96 (2012) (creating a more expansive First Amendment prohibition against the application of anti-discrimination law to religious employers); *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 507 (1979) (eradicating National Labor Board jurisdiction over parochial schools); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1374 (1981). For more recent examples, *see supra* notes 121–123.

309. *See, e.g.,* *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 545–52 (2008) (applying the Supremacy Clause to limit the authority of the Federal Energy Regulatory Commission under the *Mobile-Sierra* presumption when state law has deregulated its energy markets).

310. For instance, in *NLRB v. Catholic Bishop*, discussed *supra* note 308, the "Supreme Court affirmed the Seventh Circuit [in this case], but [only] on statutory grounds." Laycock, *supra* note 308, at 1374 (emphasis added); *see also* Robert J. Pushaw, Jr., *Labor Relations Board Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, 97 YALE L.J. 135, 135 n.2 (1987) (noting a case in which the Supreme Court evaded the constitutional questions raised by the Free Exercise and Establishment Clauses on which the Court of Appeals based its decision).

311. Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1637 (2011).

312. *Cf. LANDIS, supra* note 274 (critiquing the court-centric view of administration and arguing that it need not have been this way). For instance, Nicholas Bagley points out that there is a "puzzling

interpretation and distillation of legislation is generally accepted as an exercise of judicial power that Cynthia Farina refers to as the “independent judgment model” of statutory interpretation.<sup>313</sup>

However, statutory interpretation is also a tool of administration.<sup>314</sup> As a matter of positive law, agencies are delegated policymaking authority in order to implement legislation.<sup>315</sup> As a descriptive matter, Bill Eskridge notes that in cases since *Chevron*, “the primary engine of statutory dynamism is and long has been agencies, with courts as second-level interpreters (if that) in most instances.”<sup>316</sup> Accordingly, the “deferential model” of statutory interpretation suggests that “principal interpretive responsibility rests with the agency” and that “[t]he court must accept any reasonable construction offered by the agency, so long as the statutory language or, possibly, the legislative history is not patently inconsistent.”<sup>317</sup> Per this account, “the agency’s function is to give meaning to the statute: the court determines only whether the interpretation the agency has chosen is a ‘rational’ reading, not whether it is the ‘right’ reading.”<sup>318</sup>

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presumption” in favor of judicial review, even in instances when Congress has expressly legislated against it. *See generally* Bagley, *supra* note 283.

313. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–54 (1989) (“In [this] model, the interpretive authority rests principally with the court. Using traditional techniques of statutory construction, the court exercises its own judgment to determine de novo what the statute means.” (footnote omitted)); *see also* Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 412 (1949); Clyde W. Summers, *Frankfurter, Labor Law and the Judge’s Function*, 67 YALE L.J. 266, 303 (1957).

314. Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 24 (1940) (“To administer a statutory rule, the administrative officer or agency must first interpret it and determine the facts to which it applies. This is especially so where the statutory rule is expressed by Congress in general terms as is usual.”); Wilson, *supra* note 276, at 212 (“Every particular application of general law is an act of administration.”); Foote, *supra* note 198, at 693 (“[T]he specific procedures that agencies must use to formulate substantive rules . . . advance the values of *public administration*.”) (emphasis in original).

315. Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1447 (2017) (“Many statutes contain specific statutory delegations of authority . . . to accomplish a particular, congressionally identified goal, and resolving such matters obviously is not a matter of interpretation but of pure, naked policymaking.” (footnote omitted)); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1883–84 (2015) (arguing that agency implementation of statute is not “statutory interpretation,” but rather policymaking).

316. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1196 (2008).

317. Farina, *supra* note 313, at 454.

318. *Id.*

(It is worth noting, briefly, that the deferential model does not hinge on whether agencies exercise legislative<sup>319</sup> or executive<sup>320</sup> power while engaging in administrative statutory interpretation. Of course, any comparison of executive and legislative power is fraught. Indeed, whether power is exercised in one domain or the other may be difficult to parse<sup>321</sup> and may even be moot.<sup>322</sup>)

In many ways, *Chevron* strikes a balance between the independent judgment and the deferential models of statutory interpretation, in that it limits (albeit imperfectly) the judiciary to the role of overseer, by focusing judicial review on the reconciliation of agency action with legislative intent, as opposed to on policymaking outcomes.<sup>323</sup> Indeed, *Chevron* was once “embraced by the right as an effort to cabin the illegitimate exercise of policymaking authority of unelected judges . . . and to insist instead on the primacy of officials within the Executive Branch.”<sup>324</sup>

319. While formalists and functionalists on the farthest ends of the spectrum disagree as to whether agencies *should* exercise administrative power, they both take for granted that, for better or for worse, agencies *do* exercise legislative power. On the one hand, some formalists/originalists are dismayed that “in the modern state, and for quite some time, Congress has delegated authority to write rules and regulations with the status of laws to administrative agencies situated within the executive branch.” Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 164 (2019) (declaring that “Congress is supposed to write laws”). On the other hand, some functionalists concede that administrative policymaking power stems from a delegation of legislative power from Congress, but they are not concerned about this. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 488–90 (2001) (Stevens, J., concurring) (arguing that delegations of legislative power to agencies are acceptable as long as the delegation offers an “intelligible principle”).

320. Some argue that agencies’ policymaking authority is executive in nature—that is, associated with their duty to enforce the law. See *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (“Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”); see also WILLOUGHBY, *supra* note 30, at 8–9 (noting that primary responsibility for executing the law lies with the President and agencies); Lee, *supra* note 314, at 1 (arguing that the power of administrative agencies to prescribe interpretive regulations is inherent to their placement within the executive branch and therefore need not be delegated by Congress); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1557–60 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (suggesting this is the most agreed-upon theory of the origins of agencies’ policymaking power).

321. See Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 919–20 (1948) (differentiating between “quasi-legislative” administrative rule-making and a seemingly distinct interpretive rule-making, which traditionally falls under the “executive” administrative powers, and noting they are difficult to distinguish in practice).

322. Lee, *supra* note 314, at 25 (suggesting that the distinction between agency exercise of legislative and executive power is academic because “in most of its regulatory Acts Congress includes an authorization to ‘make such regulations as are necessary to carry out the provisions of this Act,’ or similar language”).

323. See generally Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020).

324. Sunstein, *supra* note 307, at 1618; see also Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2 (2007) (noting over a decade ago, a trend by which scholars sought to cabin judicial statutory interpretation through formalism, even as they embraced judicial discretion in constitutional theory).

Nonetheless, calls for the demise of *Chevron* are reaching a fever pitch, and the doctrine is weaker than before, due primarily to growing “judicial skepticism of administrative government.”<sup>325</sup> In particular, the views of Justices Kavanaugh and Gorsuch are a rallying cry for those seeking to eliminate judicial deference to agency statutory interpretation.<sup>326</sup> For instance, Justice Kavanaugh has argued that judges “should strive to find the best reading of the statute [and] should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous.”<sup>327</sup> This position is remarkable given Justice Kavanaugh’s inconsistent view that the judiciary should abstain from interpreting the APA in the wake of *Vermont Yankee*.<sup>328</sup>

Justice Gorsuch, too, “displays a viewpoint that, in historical terms, is relatively new at the Supreme Court level: full-scale, heated opposition to the very existence of judicial deference.”<sup>329</sup> Echoing the *Vermont Yankee* prohibition on the judicial augmentation of the APA,<sup>330</sup> Gorsuch has declared that the *Auer* doctrine (per which agencies are entitled to deference for their interpretation of their own regulations) constitutes an impermissible interpretation of the APA.<sup>331</sup> In contrast

325. Metzger, *The Roberts Court*, *supra* note 60, at 3 (suggesting that “the clearest example” of this skepticism is the mounting political pressure to eliminate *Chevron*); *see also* Cass R. Sunstein, *Chevron Without Chevron*, 2018 SUP. CT. REV. 59, 59 (2018) (noting that *Chevron* is “under serious pressure, fueled by some serious questions about the legitimacy of the regulatory state in general” (footnote omitted)).

326. *See* Metzger, *1930s Redux*, *supra* note 60, at 4 (noting, for instance, that “anti-administrative views quickly became a centerpiece of Gorsuch’s Senate confirmation hearings—surely never before have so many senators spoken at such length about the *Chevron* doctrine of judicial deference to administrative statutory interpretations” (footnotes omitted)); *id.* at 24 (“So far, only two Justices have concluded that *Chevron* deference to agency statutory interpretations is unconstitutional, though several more are willing to limit *Chevron*’s scope.” (footnotes omitted)); Bednar & Hickman, *supra* note 315, at 1451 (noting the recent conversation between now-Justice Kavanaugh and Judge Katzmman “reflect[ing] disagreement over *Chevron*’s approach to statutory ambiguity as well”) (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153–54 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)); and then citing Robert A. Katzmman, *Response to Judge Kavanaugh’s Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 398 (2016)); *see also* *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (“*Chevron* deference raises serious separation-of-powers questions.”).

327. Kavanaugh, *supra* note 326, at 2144; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (arguing that textualists like him—and presumably, Justice Kavanaugh—are less likely to find statutory ambiguity than those who give credence to legislative history while ascertaining a statutory interpretation).

328. *See supra* notes 194–195 and accompanying text.

329. Ronald Levin, *Symposium: Auer Deference — Supreme Court Chooses Evolution, Not Revolution*, SCOTUSBLOG (June 27, 2019, 11:36 AM), <https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/> [https://perma.cc/72FP-W7XC].

330. *See supra* Section I.B.

331. “When this Court speaks about the rules governing judicial review of federal agency action, we are not (or shouldn’t be) writing on a blank slate or exercising some common-law-making power. We are supposed to be applying the Administrative Procedure Act. . . . Yet, remarkably, until today this Court has never made any serious effort to square the *Auer* doctrine with the APA.” *Kisor v. Wilkie*, 139 S. Ct. 2400, 2431–33 (2019) (Gorsuch, J., dissenting) (going on to explain how *Auer* is a misconstruction of the APA).

to *Vermont Yankee*, however, Gorsuch argues that it is not the *courts*, but *agencies*, that are overempowered by this misinterpretation and therefore it is agencies, as opposed to courts, that should be constrained.<sup>332</sup>

From these Justices' perspective, eliminating deference to agencies' statutory interpretation would rightfully reestablish power in the judiciary. However, this Part argues that a nuanced treatment of this effort to curb administrative power reveals that it encourages the courts to engage more directly in policymaking. In other words, the call to overturn *Chevron* is a move toward the decider model of the judicial administration of statutory implementation.

This Part approaches this argument from three angles. First, it argues that courts have long deferred to the legislature, and to agencies themselves, the policymaking functions of administrative statutory interpretation. In other words, claims that eliminating *Chevron* deference would transfer power from agencies *back* to courts<sup>333</sup> are overstated.

Second, this Part notes that while *Chevron* concretizes the intuition that judicial review of agency statutory interpretation is separate from policymaking, it also provides adequate opportunity for courts to disengage from deference in order to uphold congressional intent on their own. In other words, *Chevron* allows courts much flexibility to exercise their powers of statutory interpretation, particularly while applying the *Mead* doctrine, otherwise known as *Chevron* Step Zero.

Third, this Part illustrates that the decider approach to judicial review of statutory interpretation has come to greater fruition under a changing application of *Chevron*. To do so, it offers an example of a model of the decider approach that has recently been implemented at *Chevron* Step One. In these cases, the Supreme Court has asserted control over the interpretation of a statute by making questionable determinations that statutory language is *unambiguous*. By claiming statutory clarity despite apparent ambiguity, the Court appears to assume the policymaking function otherwise entrusted to agencies. This continued approach suggests that, whether or not *Chevron* is overturned, courts may begin to dictate administrative policymaking outcomes at a greater pace.

#### *A. Customary Judicial Reluctance to Make Policy*

Critics of the administrative state argue that there was a golden age in which courts had significant discretionary power.<sup>334</sup> However, as this Section illustrates, they overlook the extent to which the judiciary has customarily been deferential to

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332. *See id.*

333. "Anti-administrativists" advocate for "a strong turn to the courts to protect individuals against administrative excess and *restore* the original constitutional order." Metzger, *The Roberts Court*, *supra* note 60, at 3 (emphasis added) (footnote omitted); *see also* Lee, *supra* note 86, at 1702–03. "At a general level, critics who argue for a *return* to nineteenth-century administrative law emphasize several features said to characterize the period," including that "courts, not agencies, [were tasked] with enforcement of the most coercive policies." *Id.* at 1203 (emphasis added).

334. *See* Lee, *supra* note 86; *Kisor*, 588 U.S. at 2426 (Gorsuch, J., dissenting).

agencies on matters of statutory interpretation that bear on policymaking. In this way, courts have often retreated from the decider model of the judicial administration of statutory interpretation.

“The legislature [is] the central administrative authority of the state.”<sup>335</sup> Accordingly, many “have long defended judicial power over statutory interpretation based on the assumption that judges serve as ‘faithful agents’ for Congress.”<sup>336</sup> That having been said, administrative agencies owe their existence to Congress and play their own role as faithful agents.<sup>337</sup> As a result, the judiciary is often deferential to agencies’ understanding of the legislation that animates them.<sup>338</sup>

Jerry Mashaw notes that the prevalent notion that “administrative officers adjudicating cases and making rules appeared only in the late-nineteenth and early-twentieth centuries with the creation of so-called ‘independent’ agencies” is, in fact, a misrepresentation.<sup>339</sup> In contrast, as early as the seventeenth century, philosophers warned against the exercise of lawmaking power by the judiciary:

“There is no liberty,” says Montesquieu, “if the power of judging is not separated from the legislative power and from the executive power. If it were joined to the legislative power, the power over the life and the liberty of citizens would be arbitrary; for the judge would be legislator. If it were joined to the executive power, the judge might have the force of an oppressor.”<sup>340</sup>

Accordingly, by the mid-1700s, there was widespread distrust of judicial power,<sup>341</sup> including skepticism of the judicial exercise of discretion, which led, in part, to the development of *stare decisis*.<sup>342</sup> William Nelson outlines how “judges of the eighteenth century . . . inherited a legal system that gave them little law-making power.”<sup>343</sup>

In “the late-eighteenth and nineteenth centuries . . . matters of administrative structure and technique, and how they were shaped by legislation and administrative

335. Freund, *supra* note 65, at 413 (making this observation reluctantly).

336. Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1245 (2002).

337. Metzger, *supra* note 28, at 1901; POSTELL, *supra* note 29, at 73 (noting that even in antebellum America, a time of noteworthy judicial power of the administrative state, there arose the understanding that “administrators” or “legislators,” and not the judiciary, “should be responsible for administrative decisions”). As Ernst Freund noted long ago, in some governmental systems in Europe, agencies can exercise power even “independent of statute.” Freund, *supra* note 65, at 410.

338. See Foote, *supra* note 198, at 683 n.36.

339. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 4 (2012) (“It is but a short step from [this misrepresentation] . . . to deep concerns about the legitimacy of the modern administrative state.”).

340. Pound, *supra* note 65, at 137; see also Kagan, *supra* note 1, at 2270 (criticizing the courts for “suppress[ing] political control of administration by the legislature”).

341. See NELSON, *supra* note 29, at 18 (“Given the vast powers of the courts, it is not surprising that men kept close watch over them. Colonials perceived that ‘an impartial administration of justice’ was of great ‘moment to the people . . .’”).

342. *Id.* at 18–20.

343. *Id.* at 32.

action, were necessarily at the heart of the legal enterprise.”<sup>344</sup> During that time, courts themselves explicitly acknowledged the primacy of the legislature in creating the law, and even in determining constitutionality, noting that statutory law has “its [own] force.”<sup>345</sup> Complementarily, the nineteenth-century attitude toward courts was that they should be relatively hands-off agency action too.<sup>346</sup> One commentator suggests that, since this time, agencies have had a “specification” or “completion” power to fill in statutory gaps.<sup>347</sup>

In the mid-nineteenth century, the judiciary had the power to issue writs of mandamus, including writs to government officials ordering them to properly fulfill their official duties or correct an abuse of discretion.<sup>348</sup> However, a court would compel only what it considered to be a “plain official duty, requiring *no* exercise of discretion,” which rendered the mandamus akin to an injunction enforcing the law.<sup>349</sup> And in most other circumstances, “there was no judicial review at all, with aggrieved claimants relegated either to filing internal complaints with the agency or petitioning Congress for relief.”<sup>350</sup>

Contemporaneously, “Congress had initiated programs that we would now characterize as welfare state activity: veterans’ disability pensions, the establishment and operation of seaman’s hospitals, and the provision of relief to persons suffering from ‘disasters’ brought about through no fault of their own.”<sup>351</sup> Although these operations were not large, “each required the development of administrative techniques that would generate both a capacity for implementation and sources of control and accountability.”<sup>352</sup>

Once Congress began to lack the “time, resources, foresight, and flexibility to attend to every conceivable detail of regulatory policy,” agencies were created to

344. MASHAW, *supra* note 339, at 10.

345. NELSON, *supra* note 29, at 109 (quoting *Adams v. Howe*, 14 Mass. (13 Tyng) 340, 345 (1817)).

346. MASHAW, *supra* note 339, at 10; Bagley, *supra* note 283, at 1286 (“[A]ppellate-style arbitrariness review [of agencies] was not only unheard of prior to the twentieth century, but was commonly thought to be unconstitutional.”).

347. Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 709–12 (2020).

348. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 609–10 (1838) (distinguishing between “political duties imposed upon many officers in the executive department” and duties that “grow out of and are subject to the control of law”); see also *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 261 (1908) (“It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law.”).

349. *Garfield*, 211 U.S. at 261–62 (emphasis added) (citations omitted); see also 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.3, at 162–63 (5th ed. 2010) (noting that courts would grant writs of mandamus only for ministerial, not discretionary, matters).

350. See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 942 (2011).

351. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1338 (2006).

352. *Id.*

assist in these matters.<sup>353</sup> Then, the task of implementing various programs began to be delegated to agencies via statute; those responsibilities often involved policymaking.<sup>354</sup> Some suggest that agencies fulfill only a managerial function as an extension of Congress,<sup>355</sup> while others argue that officials who oversee administration are far from limited.<sup>356</sup>

It need not have been this way. Indeed, the legislature might have assigned functions in support of itself to courts,<sup>357</sup> notwithstanding potential constitutional repercussions of this approach.<sup>358</sup> This implies that the designation of agencies—as opposed to courts—as the conduit for legislative policymaking is purposeful.<sup>359</sup> In any case, agencies were designated as an extension of the political branches of government<sup>360</sup> the way an assistant acts as the hands and labor of a visionary.

353. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 364–65 (2010) (noting that “various characteristics of agency decisionmaking and institutional structure [made] . . . agencies tolerable (and perhaps even superior) substitutes for congressional lawmaking” (footnote omitted)); *see also* McKinley, *supra* note 87 (“Much of what we now call the modern ‘administrative state’ grew out of the petition process in Congress.”); *Hearings on H.R. 4236, H.R. 6198, and H.R. 6324, before Subcommittee No. 4 of the House Judiciary Committee*, *supra* note 107, at 69, 107 (implying that agencies are better suited to administer the law than the legislature); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 442 (1998) (“Congress cannot supervise all of the details of agency action . . .”); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 951 (2000) (noting that “the constitutionally created branches needed agents to perform the vast amount of detail work required to govern a modern society”).

354. Mashaw, *supra* note 351, at 1268 (“Early Congresses delegated broad policymaking powers [which] . . . combined policymaking, enforcement, and adjudication in the same administrative hands, created administrative bodies outside of executive departments . . .”).

355. *See generally* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (suggesting that institutional realities render agency policymaking limited).

356. *See, e.g.*, Mashaw, *supra* note 351, at 1339–41; Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 90 (1996) (“Congress delegates development of substantive policies to administrative agencies under broad and general guidelines when it is impracticable or impolitic for it to make such decisions.”).

357. JAFFE, *supra* note 28, at 103 (“As we have seen, many functions can be assigned either to an agency or court or both.”); Lemos, *supra* note 353, at 365 (arguing that “we lack an account of the value—if any—of delegations to courts”).

358. JAFFE, *supra* note 28, at 103 (noting constitutional concerns when courts engage in “functions” which may be “characterize[d] as ‘administrative’ and as such [are] not ‘judicial’”); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 405 (2008) (arguing that courts as well as agencies are constrained by the nondelegation doctrine); Freund, *supra* note 64, at 668 (“The real significance of administrative ruling authority then does not lie in any diversion of genuine judicial power, but in relieving the judiciary from functions in their nature more or less legislative.”). *But see* JAFFE, *supra* note 28, at 274–76 (“The mere fact that a question can be made the subject of administrative action does not mean that it is for that reason incapable of judicial enforcement, nor does it mean that the legislature intended it to be exclusively administrative.”).

359. “To be sure, the failure of the legislature to grant the power in question [to the judiciary] may indicate an intention to withhold it.” *See* Freund, *supra* note 65, at 403.

360. Sayre, *supra* note 271, at 105.



By the twentieth century, “the Supreme Court recognized the limitations of its role in reviewing agency exercises of specific authority grants.”<sup>361</sup> Accordingly, “[c]ourts in the early part of the twentieth century tended to defer to agencies implementing and interpreting statutes.”<sup>362</sup> Only around the first period of administrative growth, just prior to the passage of the APA, did scholars begin conceiving of agency power as unconstitutional,<sup>363</sup> rather than legitimate administrative support for the political branches.<sup>364</sup> And yet, worries associated with efforts to “judicialize administrative procedure” animated full-throated disapproval of the Walter-Logan bill, the precursor to the APA.<sup>365</sup>

Eventually, the “view that legal checks, in their traditional form, are an indispensable constraint on regulatory administration”<sup>366</sup> drove the enactment of the APA in 1946, but this perspective remained unpopular at the time.<sup>367</sup> Furthermore, as Cass Sunstein has recently argued, legislative history and other considerations suggest that the APA’s judicial-review provisions did *not* require de novo judicial review of agency statutory interpretation.<sup>368</sup> A half century later, the *Chevron* opinion concretized the long-standing intuition that de novo review should be limited, by distinguishing between judicial statutory interpretation for purposes of upholding legislative intent and agency policymaking that furthered the

361. Bednar & Hickman, *supra* note 315, at 1447–48 (discussing this as evident in a case decided in 1936); see also CASS ET AL., *supra* note 106, at 245 (noting that “[w]hether a . . . court has jurisdiction over a petition for judicial review is a distinct question from whether [a] challenged agency action is reviewable”).

362. Ross, *supra* note 101, at 530–31 (“Courts even deferred to agencies’ interpretations of statutes that directly involved the Constitution.”); see also Lee, *supra* note 86, at 1703–06 (arguing that it was in fact “agencies, not the courts, [that] took the lead in interpreting the Constitution” per nineteenth century historians’ case studies of administrative constitutionalism).

363. “The exercise of discretionary authority by administrative agencies has probably been subjected to more criticism than any other task of governmental administration . . . All too frequently the exercise of discretion is loosely characterized by reference to some such vague symbolism as ‘tyranny,’ ‘despotism,’ or ‘bureaucracy.’” Cooper, *supra* note 274, at 577.

364. “[A] critical attitude reveals what appears to be a total misconception of the character of administrative discretion and the unavoidable necessity for its use in the execution of governmental policies.” *Id.* at 577–78. “This blind hostility and suspicion toward a legitimate administrative function is largely the result of a misunderstanding as to the basic problems of government which manifests itself in several different ways.” *Id.* at 577.

365. Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 277 (1978).

366. Sunstein, *supra* note 76, at 2072; see also LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, at 3 (1946) (noting in the foreword that the APA “embarks upon a new field of legislation of broad application in the ‘administrative’ area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other”).

367. Verkuil, *supra* note 365, at 276–77 (noting that interest in an administrative code like the APA was a “minority position” in contrast to many that advocated for administrative autonomy).

368. See Sunstein, *supra* note 307, at 1652–57.

implementation of statute.<sup>369</sup> Arguably, then, popular support for de novo review is a relatively new development.

### B. Chevron: *An Imperfect Doctrine of Judicial Restraint*

*Chevron* is simply a doctrine of moderate (at best) judicial restraint.<sup>370</sup> The decision made explicit the understanding that questions of policy and law are distinct and that Congress's delegation of the former to agencies should be guarded.<sup>371</sup> In other words, it is a doctrine advising courts to adhere to an overseer model of judicial administration. Note, too, that presidential administration may impact judicial deference to agency statutory interpretation. Indeed, scholars have disagreed for some time as to whether agencies should merit more or less *Chevron* deference if the interpretation is accountable to the President.<sup>372</sup>

Per *Chevron*, statutory ambiguity is a signal that Congress intended additional policymaking by agencies, not courts. As *Chevron* articulates, “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>373</sup> Furthermore, the Court declares, “When a challenge to an agency construction of a statutory provision, fairly

369. William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 138 (1991) (noting that a “line of precedents culminating with *Chevron* . . . conceded to agencies the power to fill statutory ‘gaps,’ both large and small”).

370. See Bednar & Hickman, *supra* note 315, at 1444 (“With all of the debates and complaints about *Chevron* deference, it is easy to lose sight of the fact that *Chevron* is, primarily, just a standard of review rather than a rule of decision.”).

371. See Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303–04 (1988) (arguing that a “strong reading of *Chevron*” is proper because “agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power”).

372. See Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1479–80 (2018) (interpreting *Chevron* to suggest that it “considered political accountability comparatively between the courts and executive agencies,” and not that presidential administration merits greater deference). Compare Kagan, *supra* note 1, at 2376 (“*Chevron*’s primary rationale suggests [an] approach . . . link[ing] deference in some way to presidential involvement.”), and Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 875–76 (1997), with Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 680 (2014) (arguing against the view that “presidential involvement in an agency’s decision making should intensify its entitlement to *Chevron* deference”), Stack, *supra* note 6, at 267 (arguing that “the President’s constructions of delegated authority should be eligible for *Chevron* deference, but only when they follow from statutes that expressly grant power to the President”), Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463–64, 503–15 (2003) (arguing that political accountability cannot justify *Chevron* deference if an agency’s interpretation is irrational or adopted without the force of law), and Farina, *supra* note 313, at 512 (arguing that “presidential control over domestic regulatory policy cannot cure the legitimacy problems posed by delegation” of legislative power to agencies under *Chevron*), and Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 312 (1986).

373. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."<sup>374</sup> As Justice Scalia declared once *Chevron* was decided, "Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency."<sup>375</sup> In this way, "*Chevron* . . . restrict[s] Article III courts to their appropriate institutional roles."<sup>376</sup>

And yet, this Section notes, *Chevron* also allows courts ample opportunity to exercise substantial control over administrative statutory interpretation, including in furtherance of policymaking. In other words, even a strict application of *Chevron*, as modified by more recent cases, allows courts to engage in de novo review at will.

### 1. Step Zero: A Tool of Judicial Policymaking

Even under the deferential model of statutory interpretation, courts are explicitly empowered to interpret certain ambiguous statutes.<sup>377</sup> Principles introduced by the *Mead* case, sometimes referred to as *Chevron* Step Zero, allow courts to rely on signals that suggest Congress did not intend for an agency's interpretation of statute to have authority. *Mead* declared that *Chevron* applies only if Congress delegated authority to an agency to make rules carrying the "force of law," as shown by an agency's power to engage in adjudication, notice-and-comment rulemaking, or by "some other indication of a comparable congressional intent," and the agency uses this "force of law" authority to render the interpretation at issue.<sup>378</sup>

Moreover, the *FDA v. Brown & Williamson Tobacco Corp.*,<sup>379</sup> *Massachusetts v. EPA*,<sup>380</sup> and *Gonzales v. Oregon*<sup>381</sup> cases elaborated on *Mead* to suggest that, under certain extraordinary circumstances<sup>382</sup> or in regard to "major questions"<sup>383</sup> often

374. *Id.* at 866.

375. Scalia, *supra* note 327, at 517.

376. West, *supra* note 162, at 629 (arguing that "*Chevron* [is] an analogue to *Youngstown* and to other doctrines of judicial deference that restrict Article III courts to their appropriate institutional roles"); see also *Chevron*, 467 U.S. at 865 (noting that "[j]udges . . . are not part of either political branch of the Government" and suggesting "[i]n contrast, an agency to which Congress has delegated policymaking responsibilities" is better situated to make a policy judgment).

377. See Sunstein, *supra* note 307, at 1676–78.

378. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law . . .").

379. 529 U.S. 120 (2000).

380. 549 U.S. 497 (2007).

381. 546 U.S. 243 (2006).

382. Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 763–64 (2007) (noting that in *Gonzales v. Oregon*, "the Court refused to presume that Congress would have implicitly authorized the Attorney General to reach an issue as 'extraordinary' as the restriction of physician-assisted suicide").

383. Cass Sunstein suggests that the "major questions" doctrine is a nondelegation canon that should be deployed to limit *Chevron* deference to agencies. Sunstein, *supra* note 307, at 1674–78 (arguing

concerning matters of national import<sup>384</sup> or the determination of agencies' jurisdictions,<sup>385</sup> courts can declare that Congress did not intend for agencies to interpret a statute, even if the statute is ambiguous.

The *Chevron* Step Zero doctrine is far from uncontroversial.<sup>386</sup> While some (including the *Mead* majority) argue that *Chevron* Step Zero allows courts to bring to bear a legitimate expression of legislative intent to exclude agencies from policymaking, others argue that it allows courts to commandeer policymaking.<sup>387</sup> Notably, Justice Scalia's dissent in *Mead* suggests that *Chevron* Step Zero aggrandizes judicial power at the expense of the President.<sup>388</sup> In any case, the panoply of cases that make up the *Chevron* doctrine allow the judiciary ample opportunity to take a primary role in administrative statutory interpretation.

In a recent case entitled *PDR Network*, Justice Breyer remanded a case to the court of appeals to make an assessment under *Chevron* Step Zero. In particular, he asked the court below to determine whether an agency's statutory interpretation was "legislative"—in other words, made with the force of law—and therefore an interpretation that could merit *Chevron* deference.<sup>389</sup> However, Justice Kavanaugh's concurrence emphasized that in his view the case concerned a major question or

that as a general matter that nondelegation canons should cabin *Chevron* deference to agencies); see also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2022 (2018) ("[I]n a series of cases in the past three decades, the Supreme Court has held that where a statutory ambiguity raises a question of great 'economic and political significance,' it will presume that Congress did not intend the agency to resolve the issue." (citing *King v. Burwell*, 576 U.S. 473, 486 (2015))).

384. See Bressman, *supra* note 382, at 763 (noting that in *Brown & Williamson*, "[t]he Court refused to presume that Congress would have delegated 'a decision of such economic and political significance'").

385. *Id.* at 799–800 (noting that in *Brown & Williamson* and *Gonzales v. Oregon*, agencies sought to claim jurisdiction, whereas in *Massachusetts v. EPA*, the agency "declined to assert jurisdiction under a statute that arguably encompassed the regulatory subject").

386. Cary Coglianese, *Chevron's Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1343 (2017) (noting that it is difficult to determine "[t]o what extent has the statute delegated implementing authority, including a kind of interpretive authority, to the agency").

387. See Emerson, *supra* note 383, at 2023–24 (arguing that *Mead* "licenses judicial intervention in intensely political disputes"). To this point, the Extraordinary Circumstances and Major Questions Doctrines tend to be exercised by the Supreme Court more so than lower courts, suggesting that courts are generally loath to undercut agency policymaking, provided it carries the "force of law." See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 799–800 (2017) (suggesting that the Major Questions Doctrine should be exclusively applied by the Supreme Court, noting that "lower courts lack the institutional features necessary to further the benefits of the [Major Questions Doctrine], and any lower court involvement in the exception's implementation will inflict unnecessary costs on litigants, agencies, and the courts themselves").

388. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) (noting that Justice Scalia's dissent in the *Mead* case and his general support for eliminating *Mead* (and *Skidmore*, for that matter) would "remove[] from judicial control and remit[] to presidential control [the determination of] authoritative agency interpretations" (emphasis added)).

389. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019).

issue of great importance, and that he would not defer to the agency's interpretation even if the policy may be described as legislative.<sup>390</sup>

In *King v. Burwell*, the Court declined outright to defer to an Internal Revenue Service regulation extending the tax credits the Affordable Care Act authorized to federal exchanges as well as those created by the states.<sup>391</sup> In doing so, it cited *FDA v. Brown & Williamson* to suggest that this was an “extraordinary case[]” in which Congress did not intend an implicit delegation of policymaking authority to the agency.<sup>392</sup> Nonetheless, six Justices (in a Court made up of fewer anti-administrativists than today) ultimately came to their own independent judgment that the relevant section of the statute should be interpreted just as the agency had in its regulation.<sup>393</sup> *PDR Network* and *Burwell* showcase a tension between functionalist Justices' apparent discomfort with engaging in policymaking and formalist (as well as functionalist) Justices' openness to doing so all the same.

Finally, it bears noting that the Court may engage in statutory interpretation by eschewing the entire *Chevron* framework altogether. For instance, during the George W. Bush administration, the Court interpreted the Immigration Reform and Control Act of 1986 in a manner that invalidated a National Labor Relations Board policy awarding back pay to undocumented immigrant employees in some instances, despite previous judicial interpretation to the contrary.<sup>394</sup> In this case, “the Court simply resolved the statutory question without relying on any of *Mead*, *Chevron* or *Skidmore*, notwithstanding party briefs or concurring or dissenting opinions discussing those cases.”<sup>395</sup>

And in 2015, the Court determined that the Whistleblower Protection Act bars the Transportation Security Administration from taking enforcement action against an employee who intentionally discloses sensitive security information.<sup>396</sup> This decision was based on the Court's assessment that the phrase “prohibited by law” means prohibited by statute only and excludes prohibitions made by regulation.<sup>397</sup> While the agency's regulation prohibiting the disclosure in question was effectively invalidated, the Court did not apply *Chevron* in order to do so. Instead, the Court interpreted a section of the statute that the agency simply failed to consider.

390. *Id.* at 2062 (declaring that the question of interpretation “raises significant questions under the Due Process Clause,” a “serious constitutional issue,” and that Congress could not have intended the agency's interpretation in this case).

391. 576 U.S. 473 (2015).

392. *Id.* at 485.

393. *Id.* at 498 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), no less, to hold that its reading of the legislation is “fair”).

394. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

395. See Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 549 (2014). See generally *Hoffman Plastic Compounds*, 535 U.S. 137.

396. *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383 (2015).

397. See generally *id.*

Likewise, in 2020, the Court accepted an administrative interpretation of the Affordable Care Act,<sup>398</sup> despite the fact that the Third Circuit affirmed a grant of preliminary injunction against the agency rule because the court of appeals considered the interpretation to be at odds with the statute itself.<sup>399</sup> Superficially, the Supreme Court simply disagreed with the Third Circuit's interpretation of statute and did not engage in a deference analysis, although the concurrence argued that it should have.<sup>400</sup> As a result, however, the Court wielded its own power to decide the proper interpretation of statute in lieu of the agency.

## 2. Step One: A Turn Toward the “Decider” Approach

Prominent formalist Justice Kavanaugh has argued that it is precisely because statutory ambiguity can be found in any statute that judges should be the only arbiters of statutory meaning in every instance.<sup>401</sup> However, by arguing that courts should ignore ambiguity and interpret all statutes as they wish, Kavanaugh is not advocating for the reinforcement of judicial power but, rather, for increasing the judiciary's opportunity to make policy decisions in lieu of agencies.

In addition, “[e]ven when judges employ pure de novo review using traditional tools of statutory construction with no layer of deference intruding, they often disagree over what statutes mean,”<sup>402</sup> which suggests that many interpretations are

398. In this case, the Supreme Court implies that the statute clearly allows for the agency's new policy, issued at President Trump's direction, allowing employers to opt out of providing no-cost contraceptive coverage under the Affordable Care Act. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); see also *id.* at 2397 (Kagan, J., concurring) (arguing that both the majority and dissent are incorrect that the statute is clear).

399. *Pennsylvania v. President of the United States*, 930 F.3d 543, 575–76 (3d Cir. 2019), *rev'd sub nom.*, *Little Sisters of the Poor*, 140 S. Ct. 2367 (affirming the grant of preliminary injunction against agency rule allowing, at President Trump's direction, employers to opt out of providing no-cost contraceptive coverage under the Affordable Care Act). “Nowhere in the enabling statute did Congress grant the agency the authority to exempt entities from providing insurance coverage for such services nor did Congress allow federal agencies to issue regulations concerning this coverage without complying with the Administrative Procedure Act.” *Id.* at 555.

400. “Try as I might, I do not find . . . clarity in the statute. . . . But *Chevron* deference was built for cases like these. *Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme.” *Little Sisters of the Poor*, 140 S. Ct. at 2397 (Kagan, J., concurring) (citations omitted).

401. See *supra* text accompanying note 326.

402. Bednar & Hickman, *supra* note 315, at 1446–47 (noting further that “even if one pursues a robust, de novo–like analysis of statutory text, history, and purpose, some statutory questions simply do not have answers that can be derived through traditional common law reasoning”); see also Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALA. L. REV. 733, 746 (2019) (illustrating that even “traditional tools of statutory interpretation are not especially helpful in narrowing statutory meaning to the point of practical application”); Sunstein, *supra* note 325, at 61 (noting that both “textualism and purposivism sometimes fail to give concrete answers to difficult statutory questions” under *Chevron*); Stewart, *supra* note 33, at 1785 (observing that “considerable . . . judicial reconstruction of a statute may be required in order to” assign paramount weight to one particular purpose).

policy determinations, not a clear expression of legislative intent. And as Merrick Garland notes, the risk that a court may “substitute its judgment for the agency’s . . . inhere[s] in a court’s determination of which of several statutory purposes the legislature considered most important.”<sup>403</sup> Therefore, while interpreting ambiguous legislation, “the court may be tempted to substitute its own hierarchy of values for that of Congress.”<sup>404</sup>

This Section argues more narrowly that, if a court makes an *erroneous* determination that a statute is unambiguous, its *de novo* interpretation of that statute may in fact constitute policymaking. This mistaken determination, made at *Chevron* Step One in a handful of cases, offers another opportunity for the decider model of judicial administration. The rest of this Part suggests, on the basis of examples, that porous determinations of unambiguity at *Chevron* Step One have already moved the judicial administration of statutory implementation toward the decider approach.

Statutory ambiguity signals that Congress has delegated to the agency the power to “fill statutory gaps” via policy.<sup>405</sup> Therefore, once the court has dispensed with *Mead*,<sup>406</sup> its first step under *Chevron* is to determine whether the statute at issue is ambiguous. As Kristin Hickman argues, “*Chevron* step one, properly understood, already strongly resembles *de novo* review”<sup>407</sup>—and, in this way, allows a court to forgo deference if it determines that Congress did not intend the agency to exercise policymaking power.

When a statute delegates policymaking power to an agency via ambiguity,<sup>408</sup> “the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable.”<sup>409</sup> Conversely, without ambiguity, an agency official has no discretion; in other words, “clear legislative meaning will always make unlawful any agency action that conflicts with that meaning.”<sup>410</sup> Therefore, if a court’s claim that a statute is unambiguous is feeble, the court may, in fact, be engaging in policymaking under the guise of declaring the legislature’s clear intent.

403. Garland, *supra* note 230, at 558.

404. *Id.* Accordingly, there is an “overlooked cost of eliminating or narrowing *Chevron* deference: such reform could result in partisanship playing a larger role in judicial review of agency statutory interpretations.” Barnett et al., *supra* note 372, at 1464.

405. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also* Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 870–72 (2001); Scalia, *supra* note 327, at 516–17.

406. *See supra* text accompanying notes 378–385.

407. Kristin E. Hickman, *SOPRA? So What? Chevron Reform Misses the Target Entirely*, 14 U. ST. THOMAS L.J. 580, 587 (2018).

408. Whether this refers to ambiguity as a general matter, or ambiguity as to whether Congress authorized the agency to make policy under the law, while highly contested by those who read *Chevron*, does not matter much in the doctrine’s practical application; in either case, agencies have some claim to policymaking power. *See, e.g.*, Merrill & Hickman, *supra* note 405, at 833.

409. Scalia, *supra* note 327, at 516.

410. Coglianese, *supra* note 386, at 1344.

It is important to note that this Section assumes that there are tools for determining whether statutory ambiguity exists. The determination of ambiguity is difficult, to say the least.<sup>411</sup> There is a robust literature debating the legitimacy of various canons of statutory interpretation as they relate to the determination of ambiguity at *Chevron* Step One.<sup>412</sup> The debate as to whether textualism, purposivism, or any other mode of interpretation—including newer modalities of cost-benefit analysis<sup>413</sup>—should be deployed is both highly relevant to the determination of statutory ambiguity at Step One and, regrettably, beyond the scope of this Section to arbitrate. Rather than engaging in deliberation about how to determine whether a statute is ambiguous, this Section assumes that a statute may, theoretically, be identified as ambiguous by a court.<sup>414</sup> More specifically, this Section relies on the views of distinguished commentators—including courts of appeals decisions and dissenting Supreme Court Justices—that characterize a court decision as having wrongfully deemed a statute unambiguous.

*Sturgeon v. Frost II*,<sup>415</sup> decided recently, illustrates not only the strong inclinations of several Justices who favor de novo review but also a seeming indifference in the rest toward the potential for courts to be policymakers as a result. In this case, the entire Supreme Court interpreted the statutory language “public lands” in the Alaska National Interest Lands Conservation Act to exclude navigable waters.<sup>416</sup> In doing so, the Court invalidated the National Park Service’s national regulations concerning these waters.<sup>417</sup> However, the divergent justifications of the majority and the concurrence are telling.

In the majority opinion, Justice Kagan declined to defer to the agency’s interpretation of “public land” as inclusive of navigable waters because this language *unambiguously* excludes navigable waters.<sup>418</sup> However, the Ninth Circuit, in the decision below, relied extensively on precedent interpreting this statute to conclude

411. As Scalia once declared in regard to Step One, “How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.” Scalia, *supra* note 327, at 520–21.

412. See, e.g., Sunstein, *supra* note 325, at 71 (noting that “it is not easy to identify a canon of construction to settle the question how to interpret the word ‘[statutory] source,’” the terminology at issue in *Chevron*); Sunstein, *supra* note 307 (arguing that textualism is the correct approach to determining ambiguity at *Chevron* Step One); Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (noting that the Supreme Court has moved to a textualist approach at *Chevron* Step One).

413. See Sunstein, *supra* note 325, at 73 (discussing this new “canon” of statutory interpretation deployed by courts).

414. If Cass Sunstein may make this assumption, I, too, am so emboldened. See Sunstein, *supra* note 307, at 1613.

415. 139 S. Ct. 1066 (2019).

416. *Id.* at 1085–87.

417. *Id.*

418. “Because we see, for the reasons given below, no ambiguity as to Section 103(c)’s meaning, we cannot give deference to the Park Service’s contrary construction.” *Sturgeon II*, 139 S. Ct. at 1080 n.3.



that the navigable water in question was indeed “public land.”<sup>419</sup> The disagreement between the Ninth Circuit and Supreme Court as to the meaning of “public land” suggests that the term is ambiguous.

In addition, the concurrence, written by Justice Sotomayor and joined by Justice Ginsburg, noted as well that the language is ambiguous.<sup>420</sup> Nonetheless, they join the majority because its reading of the statutory language is “cogent,” and because of “the important regulatory pathways that the Court’s decision leaves open for future exploration.”<sup>421</sup> That the Court engaged in policymaking does not mean that the decision was wrong.<sup>422</sup> It means, simply, that since the language at issue was ambiguous, the Supreme Court’s interpretation constituted policymaking, rather than an expression of evident legislative intent.

Likewise, in *Carcieri v. Salazar*, the Court held in 2009 that the Indian Reorganization Act of 1934 did not apply to tribes not recognized at the time of the statute’s creation, which meant that it invalidated the Department of the Interior’s long-standing policy of taking land into trust for Indian tribes recognized after that time.<sup>423</sup> The matter in dispute concerned the statutory term “now.”<sup>424</sup> The statute allows the Department of the Interior to take land into trust for “all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction.”<sup>425</sup>

“[A] majority of the Court found the meaning of the statute clear.”<sup>426</sup> More specifically, Justice Thomas drew on a textualist/originalist approach to decide that “‘now under Federal jurisdiction’ refers to a tribe that was under federal jurisdiction at the time of the statute’s enactment.”<sup>427</sup>

However, the “concurrence found the statute ambiguous.”<sup>428</sup> Justice Breyer noted in concurrence that “now under Federal jurisdiction” could also “refer to the time the Secretary of the Interior exercises his authority to take land ‘for Indians.’”<sup>429</sup> Likewise, those in dissent both agreed with this latter construction and also argued that this language is tangential to the crux of the matter.<sup>430</sup>

419. *Sturgeon v. Frost*, 872 F.3d 927 (9th Cir. 2017), *rev’d*, 139 S. Ct. 1066.

420. *See Sturgeon II*, 139 S. Ct. at 1087–88 (Sotomayor, J., concurring) (drawing on H.L.A. Hart’s “vehicles in the park” exercise to suggest that statutory language at issue is ambiguous).

421. *Id.* at 1088 (Sotomayor, J., concurring).

422. Arguably, the fact that all nine Justices ultimately signed on to the policy outcome (albeit for different reasons) suggests the outcome is correct, or at least supported by a number of great legal minds. *See generally id.*

423. 555 U.S. 379 (2009).

424. *Id.* at 388.

425. Indian Reorganization Act of 1934, 25 U.S.C. § 479 (emphasis added).

426. Hickman, *supra* note 395, at 542.

427. *Carcieri*, 555 U.S. at 382; *see also id.* at 388 (examining the meaning of the term “now” as defined by Webster’s New International Dictionary and Black’s Law Dictionary in 1934 and 1933, respectively).

428. Hickman, *supra* note 395, at 542.

429. *Carcieri*, 555 U.S. at 396 (Breyer, J., concurring).

430. *See id.* at 402 (Stevens, J., dissenting) (“Yet to my mind, whether ‘now’ means 1934 (as the Court holds) or the present time (as respondents would have it) sheds no light on the question whether

Per the formalism/textualism of Justice Kavanaugh,<sup>431</sup> the disagreement between the majority and the concurrence as to the meaning of the term “now” reveals the ambiguity of this term. Despite this seeming ambiguity, however, the majority declined to defer to the agency’s interpretation of the term “now.”<sup>432</sup> Instead, it engaged in an independent interpretation of the language. In other words, the Court furthered a new administrative policy that invalidated the Department of the Interior’s own policy. The concurrence also refused to defer to the agency by arguing, under *Mead*, that Congress did not give the agency the authority to interpret the term “now.”<sup>433</sup> This analysis, too, suffers from indeterminacy that offers a pathway to judicial policymaking.<sup>434</sup> More broadly, both *Sturgeon II* and *Carcieri* suggest that, as a result of a loosened application of *Chevron* Step One, the judiciary has engaged in policymaking recently, for better or for worse.<sup>435</sup>

This route to judicial policymaking is not new. In 1994, in *Brown v. Gardner*, the Court unanimously invalidated a Department of Veterans Affairs regulation based on its own statutory interpretation.<sup>436</sup> Despite the longevity of the regulation<sup>437</sup> and legislative silence on whether it comports with a statute passed in 1934,<sup>438</sup> the Court declared that the regulation misread ambiguity into the statute,<sup>439</sup> thus reversing a sixty-year-old policy. Some suggest that the Court did so in order

the Secretary’s actions on behalf of the Narragansett were permitted under the statute.”); *id.* at 400 (Souter, J., concurring in part and dissenting in part) (“Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.”).

431. See *supra* text accompanying note 401; Kavanaugh, *supra* note 326, at 2144 (discussing the model of judge as umpire).

432. *Carcieri*, 555 U.S. at 396.

433. *Id.* at 396–97 (Breyer, J., concurring) (“These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity.” (citing *United States v. Mead Corp.*, 533 U.S. 218, 227, 229–30 (2001))); see also Hickman, *supra* note 395, at 542–53 (noting that while Justice Breyer conceded the term “now” is ambiguous, he nonetheless declined to defer to the agency under *Chevron*).

434. See *supra* text accompanying notes 386–388.

435. Matthew Sanders, *Sizing up Sturgeon v. Frost*, A.B.A. (May 10, 2019), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2018-2019/may-june-2019/sizing-up-sturgeon/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/may-june-2019/sizing-up-sturgeon/) [<https://perma.cc/FCS5-4DSD>] (noting that *Sturgeon II* eliminates the National Park Service’s ability to regulate hovercrafts on certain waters); Bethany C. Sullivan & Jennifer L. Turner, *Enough Is Enough: Ten Years of Carcieri v. Salazar*, 40 PUB. LAND & RES. L. REV. 37, 37 (2019) (arguing that “*Carcieri* has been weaponized by states, local governments, citizens’ groups, individuals, corporations, and even other tribes, to challenge the exercise of tribal sovereignty”).

436. 513 U.S. 115 (1994).

437. *Id.* at 122 (“[W]e dispose of the Government’s argument that the [agency’s] regulatory interpretation . . . deserves judicial deference due to its undisturbed endurance for 60 years.”).

438. *Id.* at 120–21 (“The Government contends that . . . Congress’s legislative silence as to the [agency’s] regulatory practice over the last 60 years serves as an implicit endorsement of its fault-based policy.”).

439. *Id.* at 117–18 (“Ambiguity is a creature not of definitional possibilities but of statutory context, and this context negates a fault reading [that is, the agency’s interpretation of the statute].” (citations omitted)); see also *Federal Statutes and Regulations*, 124 HARV. L. REV. 340, 388 (2010) (characterizing the decision in *Gardner* as “based on a narrow textual reading”).

to enshrine a more “veteran-friendly” approach to government policies—in particular, one that allows a veteran-friendly interpretation to prevail over the agency’s interpretation when a statute is ambiguous.<sup>440</sup>

In 1990, in *Dole v. United Steelworkers of America*, the Court denied deference to the Office of Management and Budget’s long-standing policy of allowing it to review and countermand agency regulations mandating disclosure by regulated entities directly to third parties.<sup>441</sup> More specifically, the Court decided that the Paperwork Reduction Act is “clear and unambiguous on the question whether it applies to agency directives to private parties to collect specified information and disseminate or make it available to third parties.”<sup>442</sup> In response, the dissent called this determination of unambiguity “questionable”;<sup>443</sup> argued that the agency’s interpretation merits deference;<sup>444</sup> and declared further that “[i]f *Chevron* is to have meaning, it must apply when a statute is as ambiguous on the issue at hand as the [Paperwork Reduction Act] is on the subject of disclosure requirements.”<sup>445</sup> Some characterize this case as illustrative of the Court’s reluctance to allow an agency to determine the scope of its own jurisdiction.<sup>446</sup> Others suggest, however, that the Court initiated this policy to curb the Office of Management and Budget,<sup>447</sup> a powerful White House agency that furthers presidential administration.

440. See James D. Ridgway, *Toward a Less Adversarial Relationship Between Chevron and Gardner*, 9 U. MASS. L. REV. 388, 393–94 (2014); Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has It Mastered Chevron’s Step Zero?*, 3 VETERANS L. REV. 67, 70 (2011) (describing *Gardner* as a doctrine advising that “interpretive doubt should be resolved in the veteran’s favor”); Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner’s Presumption that Interpretive Doubt Be Resolved in Veterans’ Favor with Chevron*, 61 AM. U. L. REV. 59, 59 (2011) (noting that the conflict between *Chevron* and “*Gardner*’s Presumption” has led to the quandary of “[w]hich interpretation controls when a statute is ambiguous—the agency’s reasonable interpretation or the veteran’s interpretation?”).

441. 494 U.S. 26 (1990).

442. *Id.* at 43–44 (White, J., dissenting).

443. *Id.* at 43 (White, J., dissenting) (noting skeptically that the Court required “more than 10 pages, including a review of numerous statutory provisions and legislative history,” to come to this conclusion); see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1000 n.129 (1992) (noting that in *Dole v. United Steelworkers*, the Court rejected the “Office of Management and Budget’s construction of the Paperwork Reduction Act largely on the basis of structural arguments and canons of construction”); Jellum, *supra* note 412, at 756–57 (characterizing the Court’s statutory interpretation as “intentionalist”). “Given his general textualist approach, it is indeed odd that Justice Scalia signed onto this opinion, which represented everything about statutory interpretation with which he disagreed.” *Id.*

444. “Since the statute itself is not clear and unambiguous, the legislative history is muddy at best, and [the Office of Management and Budget] has given the statute what I believe is a permissible construction, I cannot agree with the outcome the Court reaches.” *Dole*, 494 U.S. at 53 (White, J., dissenting).

445. *Id.*

446. See, e.g., Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 749 n.139 (2014); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1934 (2012).

447. See, e.g., Pamela M. Foster, *A Limit to OMB’s Authority Under the Paperwork Reduction Act in Dole v. United Steelworkers of America: A Step in the Right Direction*, 6 ADMIN. L.J. AM. U. 153 (1992).

Also in 1990, in *Sullivan v. Zebley*,<sup>448</sup> the Court required the Secretary of Health and Human Services to revise and create several regulations in response to the Court's new reading of the relevant statute.<sup>449</sup> The *Zebley* majority accepted the lower court's determination that the statute at issue is unambiguous.<sup>450</sup> In response, the dissent in this case implored the majority to reconsider its assumption that legislative intent is clear in this case.<sup>451</sup> In doing so, it argues, as have other commentators, that the statute is unambiguous and therefore the agency's reasonable interpretation should stand.<sup>452</sup> As a result of "*Zebley*, the [Social Security Administration, which at the time was part of the Department of Health and Human Services,] revised the rules used to evaluate childhood disability claims, promulgating several new regulations."<sup>453</sup> Here, there is a lack of clarity as to whether the Court is rejecting the agency's interpretation at *Chevron* Step One or Step Two.<sup>454</sup> To the extent it is the latter, the Court's decision is that much more surprising, given that courts tend to defer to agencies at Step Two.<sup>455</sup>

Again, the analysis in this Section offers no value judgment as to whether the Court's decision was correct. Perhaps the Court stepped in righteously to fill a gap in the statute that was unanticipated by the enacting Congress—the coverage of disabled children for the relevant social security benefits when only adults were considered in the text. Rather, this framing suggests that the Court's reinterpretation of the statute and refutation of the Secretary's regulations do not reflect clear legislative intent, but rather, were acts of policymaking.

Addled by the Court's policymaking, agencies have gone to Congress to demand a clarification. For instance, in *Dunn v. Commodity Futures Trading Commission*, the Supreme Court applied an ordinary-meaning analysis to hold that the Treasury Amendment to the Commodity Exchange Act exempts off-exchange

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448. 493 U.S. 521 (1990).

449. See generally Amber R. Anderson, *Disabled Without Benefits: The Impacts of Recent Social Security Reforms on Disabled Children*, 41 B.C. L. REV. 125, 130–31 (1999) (discussing the new multi-step regulatory process that resulted from the *Zebley* decision).

450. See *Zebley*, 493 U.S. at 527 ("Although the Court of Appeals recognized that the Secretary's interpretation of the statute is entitled to deference, it rejected the regulations as contrary to clear congressional intent.").

451. *Id.* at 542 (White, J., dissenting) ("We [must] first ask whether Congress has expressed a clear intent on the question at issue here; if so, we should enforce that intent. If not, as I think is the case, we should defer to the agency's interpretation as long as it is permissible.").

452. *Id.*; see also Merrill, *supra* note 443, at 991 (citing *Zebley* to support the argument that the *Chevron* "plain meaning" inquiry has tended in practice to devolve into an inquiry about whether the statute as a whole generates a *clearly preferred* meaning" (emphasis in original) (footnote omitted)).

453. Anderson, *supra* note 449, at 131.

454. See Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 131–32 (1993) (citing *Zebley* to support the contention that "the Court has been quite willing to reject agency interpretations, and the Court is often reluctant to 'defer' in the sense of accepting a reasonable agency interpretation when it prefers an alternative interpretation" (footnote omitted)).

455. Shah, *supra* note 1, at 671 n.140 ("Step Two of the *Chevron* analysis, at which point the court decides whether an agency's interpretation of ambiguous statute is reasonable, tends to be permissive; generally, the agency's interpretation [stands] at that level." (citations omitted)).

trading in foreign currency options from Commodity Futures Trading Commission regulation.<sup>456</sup> In part because this ruling “served to encourage the continuation of widespread fraud in retail [over-the-counter] futures and options on currencies,” which cuts against the legislative purpose driving the Commodity Futures Trading Commission, the agency beseeched Congress “to regulate dealers selling retail foreign exchange futures or options.”<sup>457</sup> Eventually, Congress passed this law.<sup>458</sup> On the one hand, it may have done so because the language of the Treasury Amendment indeed lent itself to only the Court’s interpretation proffered in *Dunn*. On the other hand, this chain of events offers the possibility that Supreme Court’s interpretation of the Treasury Amendment was an iteration of legislative policymaking that Congress eventually thwarted.

Finally, it is worth noting that the Court can limit agencies’ policymaking authority by rebuking their efforts as an infringement on the legislature, while also limiting the scope of its *own* legislative policymaking. For example, in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, the Court rejected the agency’s interpretation at Step One of the *Chevron* inquiry<sup>459</sup> by disputing the Federal Reserve Board’s interpretation of the term “banks” in legislation designed to regulate financial institutions.<sup>460</sup> More specifically, the Board stated that “banks” includes financial institutions that are “functionally equivalent” to banks, while the Court disagreed.<sup>461</sup>

The Court went on to declare that “[r]ather than defining ‘bank’ as an institution that offers the functional equivalent of banking services, however, Congress *defined with specificity* certain transactions that constitute banking subject to regulation”—in other words, that Congress intended to apply the plain meaning of banks and not its extension to nonbank institutions.<sup>462</sup> “The statute may be

456. 519 U.S. 465, 470–71 (1997); *see also* Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701, 786 (1999); Thomas A. Tormey, Note, *A Derivatives Dilemma: The Treasury Amendment Controversy and the Regulatory Status of Foreign Currency Options*, 65 FORDHAM L. REV. 2313, 2320 (1997).

457. Jerry Markham, *Regulating the Moneychangers*, 18 U. PA. J. BUS. L. 789, 841 (2016).

458. *Id.* (noting that “Congress included such authority in the Commodity Futures Modernization Act of 2000”).

459. Merrill, *supra* note 443, at 1034, 1038 app. (characterizing *Dimension Financial Corp.* explicitly as a Step One inquiry); Jonathon Bloomberg, *The Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion*, 73 CORNELL L. REV. 113, 122 n.75 (1987) (noting that in *Dimension Financial Corp.*, “the Court overruled agency action as violating clear congressional intent in a classic application of the first tier of the review framework” (citations omitted)); *see also id.* (listing *Dimension Financial Corp.* as evidence that *Chevron* has taken hold of cases on financial regulation).

460. 474 U.S. 361, 367–68 (1986).

461. *Id.* at 362; “The Federal Reserve Board had expanded its regulations to encompass institutions which offered bank-like services [by reinterpreting] . . . the definition of ‘bank’ found in section 2(c) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841(c) (1982). The Court ruled that the statutory definition of ‘bank’ clearly precluded the Board’s action.” Bloomberg, *supra* note 459, at 122 n.75.

462. *Dimension Fin. Corp.*, 474 U.S. at 374 (emphasis added); *see also* Keith R. Fisher, *Federalism Contra Federal Reservism: Bank Holding Companies and State Bank Powers*, 23 U.S.F. L. REV. 317, 318

imperfect,” the Court went on to say, “but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.”<sup>463</sup> Furthermore, “[t]he Court [also] found itself constrained by the Act’s language, stating, ‘If the Bank Holding Company [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.’”<sup>464</sup> In this case, the Court sought to constrain administrative policymaking power while also maintaining its own formal boundaries. The policies in question may have suffered, but the Court remained in its role of overseer, as opposed to acting as a decider.

### III. IMPLICATIONS FOR THE ADMINISTRATIVE STATE

This Article’s primary contribution thus far has been to provide a comprehensive framework of judicial administration. This Part earmarks some of the potential ramifications of courts administering the law. Like Kagan herself admitted of presidential administration, judicial administration might “push past the edges of legality.”<sup>465</sup> Critics of administrative agencies must grapple with the separation-of-powers implications of an uncritical view of judicial oversight, particularly of the decider approach to administrative statutory interpretation.

And yet, despite the potential constitutional consequences of judicial administration, it is uniquely suited to combat the transgressions of presidential administration. By maintaining or increasing the judiciary’s power to oversee agency adherence to due process and rule-of-law values, courts may better constrain concerning exercises of presidential power.

#### *A. The Constitutionality of Judicial Administration*

As noted in the Introduction, there are fervent arguments among academics and in popular discourse surrounding the constitutional legitimacy of the administrative state. Formalists, in particular, argue for an increase of judicial power over agency action because they believe that agencies exercise unconstitutional power.<sup>466</sup> More specifically, many decrying agency power today focus on enhancing judicial control of administrative statutory interpretation.<sup>467</sup>

However, the constitutional legitimacy of judicial administration is debatable, too. Indeed, judicial administration has the potential to violate the constitutional separation of powers, particularly if one abides by a formalist paradigm.

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n.9 (1989) (noting that the Court in this case viewed the agency’s statutory interpretation as “at odds with the plain meaning of the statute”).

463. *Dimension Fin. Corp.*, 474 U.S. at 374.

464. Bloomberg, *supra* note 459, at 122 n.75 (citations omitted).

465. Farber, *supra* note 207, at 4.

466. See *supra* notes 58–61 and accompanying text.

467. See *supra* notes 325–332 and accompanying text.

By condemning the judicial augmentation of informal rulemaking procedures, *Vermont Yankee* articulated a formalist rebuke of judicial policymaking—that is, of the decider model of judicial administration in this context.<sup>468</sup> Likewise, the *Chevron* doctrine, which guides the judiciary to defer to policies based in agencies' interpretations of statute, restrains judicial policymaking somewhat.<sup>469</sup> And yet, many formalists call for the dilution or elimination of *Chevron* deference, thus advocating for the decider model of judicial administration—that is, for a *stronger* norm of judicial policymaking.<sup>470</sup> Although *Chevron* still stands, its dilution by *Mead*<sup>471</sup> and at Step One<sup>472</sup> has led to an increase in judicial policymaking. If agencies indeed exercise constitutional power (be it legislative<sup>473</sup> or executive<sup>474</sup>), then the decider model of judicial administration is outside the scope of the judiciary's formal constitutional jurisdiction and an infringement on the legislative<sup>475</sup> or executive branches,<sup>476</sup> including in the context of statutory interpretation/implementation.

To the extent judicial review of constitutional due process is based in the overseer model, as argued earlier,<sup>477</sup> it, like the overseer model of presidential administration,<sup>478</sup> is less objectionable under a formal separation-of-powers framework. It is inconsistent, then, that formalists have argued for limits to judicial oversight of administrative due process and individual rights in the past,<sup>479</sup> but now advocate deeply for enhancing courts' ability to make policy decisions via statutory interpretation.<sup>480</sup>

Instead of this paradoxical approach to judicial review, formalists might make the linchpin of their advocacy the idea that the legislature reclaim certain administrative responsibilities.<sup>481</sup> But this tack, too, has its problems. As Hickman and Bednar suggest,

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468. See *supra* Section I.B.

469. See *supra* Section II.B.

470. See John Yoo & James C. Phillips, *With Kavanaugh, the Court Should Tame the Administrative State*, NAT'L REV. (Oct. 25, 2018, 6:30 AM), <https://www.nationalreview.com/2018/10/supreme-court-brett-kavanaugh-administrative-state/> [<https://perma.cc/YC2V-5P89>] (“Our constitutional system has the genius of diffusing power among three branches of the national government . . . [F]orsaking the Founders’ limits on government in the name of administrative ease would bring far more ruin than failing to attend to the popular policy of the day.”).

471. See *supra* Section II.B.1.

472. See *supra* Section II.B.2.

473. See *supra* note 319 and accompanying text.

474. See *supra* note 320 and accompanying text.

475. Lemos, *supra* note 358, at 408 (noting that “just as agencies exercise a lawmaking function when they fill in the gaps left by broad statutory delegations of power, so too do courts”).

476. Cooper, *supra* note 274, at 596–98.

477. See *supra* Part I.

478. See *supra* text accompanying notes 43–44.

479. See *generally supra* Part I.

480. See *generally supra* Part II.

481. See Bednar & Hickman, *supra* note 315, at 1461 (“To the extent that courts and commentators want to curtail the administrative state, they should focus their efforts on rolling back congressional delegations of policymaking discretion to agency officials rather than overturning

[U]nless Congress chooses to assume substantially more responsibility for making policy choices itself or the courts decide to seriously reinvigorate the nondelegation doctrine—neither of which seems remotely likely—at least some variant of *Chevron* deference will be essential to guide and assist courts from intruding too deeply into a policy sphere . . . .<sup>482</sup>

To formalists’ dismay, courts may continue to “defer” to agencies’ interpretations of statute as a functional matter even in the event that *Chevron* falls, in order to limit judicial involvement in legislative policymaking,<sup>483</sup> particularly in a world where the nondelegation doctrine remains permissive.<sup>484</sup> Courts may continue to maintain “the line between law and policy in administrative law” and to limit their intervention to problems associated with the former, as Jeffrey Pojanowski advises they do.<sup>485</sup> A more sound approach to curtailing *Chevron* might be to bolster doctrines of judicial oversight that are in tension with it, such as hard look review.<sup>486</sup>

All of this having been said, judicial administration—even the decider model—does not constitute an infringement on the legislature if one takes a more functional view of the separation of powers.<sup>487</sup> Functionalists do not have cause to

*Chevron*.”); Aaron L. Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1, 4–5 (2017) (arguing that some anti-administrativists are already looking to Congress to curb agency power).

482. Bednar & Hickman, *supra* note 315, at 1398; *see also* Metzger, *The Roberts Court*, *supra* note 60 (noting that “bold assertions of administrative authority stem in part from Congress’s inability to address pressing problems, with political polarization, intense partisanship, and near parity between the main parties often leading to legislative gridlock”).

483. *See* Hickman, *supra* note 407, at 580, 590 (arguing that even if *Chevron* is overturned, “once a statutory question crosses into the policymaking sphere, many if not most judges and justices are uncomfortable with making what they recognize as fundamentally policy-based decisions rather than traditional interpretive ones. In such cases, their inclination will be to defer to the agency”); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1076 (2016) (arguing that, even if *Chevron* did not exist, courts would continue to distinguish between legal interpretation and policymaking); Sunstein, *supra* note 325, at 79 (“[A]fter a lengthy and difficult cleanup operation, and after adoption of novel formulations, the framework that would ultimately replace *Chevron* would be likely to operate, in practice, a fair bit like that in *Chevron* itself.”).

484. *See generally* Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003).

485. Pojanowski, *supra* note 323, at 884 (advocating for a theory of law which would “increase[] judicial responsibility on questions of law while decreasing it on matters involving policymaking discretion”).

486. For example, in *Encino Motorcars*, the Court declined to apply *Chevron* to a statutory interpretation where the agency failed hard look. *See supra* note 245 and accompanying text; *see also* Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 31 n.188 (2017). Conversely, *Chevron* may moderate hard look review. Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 929 (2007).

487. *See supra* text accompanying notes 62–66.



be overly troubled by judicial administration, except to the extent that it creates functional problems<sup>488</sup> or leads to partisan outcomes.<sup>489</sup>

Functionalists might cheer an intensification in either the overseer or decider models of judicial administration, depending on their impact on the quality of administrative function. For instance, as the next Section suggests, amplifying the overseer model could lead to greater fairness in administrative process and more expert and uniform policies. Formalists, too, might focus their advocacy for judicial power on enhancing the overseer model, to curb the administrative state while reducing potential separation-of-powers problems.

### *B. Judicial Vis-à-Vis Presidential Administration*

This Article concludes with thoughts on the potential interaction between judicial and presidential administration. In some cases, conflicts between judicial and administrative policymaking represent a clash of judicial and executive powers. Justice Kagan has argued that “courts should attempt, through their articulation of administrative law, to recognize and promote” presidential administration.<sup>490</sup> For instance, she and others suggest courts should accede to the President in the view of those that support the political accountability theories of hard look<sup>491</sup> or *Chevron*,<sup>492</sup> or that advocate more generally for a unitary executive.<sup>493</sup>

In addition, presidential administration may shape or constrain judicial administration. At its most literal, the executive branch can harness the judiciary. For instance, judges themselves might be appointed by the President to directly serve in an executive agency;<sup>494</sup> unlike members of Congress, there is no clear proscription against the appointment of judges into nonjudicial offices (although commentators have likewise raised separation-of-powers concerns about the practice,<sup>495</sup> and the Supreme Court has suggested that judicial participation in

488. See *supra* note 66 (discussing functionalist concerns with judicial review of agencies such as ossification and inferior judicial expertise). More broadly, courts’ own interest in administering the law may vary across agencies; indeed, some agencies are known for garnering far less judicial oversight than others. John C. Kilwein & Richard A. Brisbin Jr., *Supreme Court Review of Federal Administrative Agencies*, 80 JUDICATURE 130, 132 (1996) (outlining which agencies appear before the court the most and their relative success).

489. See Shah, *supra* note 1, at 668–69 (offering analysis of decisions written by Justices Gorsuch and Kavanaugh that suggest the Supreme Court is susceptible to political capture).

490. See Kagan, *supra* note 1, at 2363 (arguing that “courts should attempt, through their articulation of administrative law, to recognize and promote” presidential administration).

491. *Id.* at 2380.

492. See *supra* note 372 and accompanying text.

493. See Kagan, *supra* note 1, at 2271–72 (articulating ways in which unitary executive theorists argue that courts should accord legislative and administrative power to the President). For an oft-cited treatise espousing unitary executive theory, see Calabresi & Prakash, *supra* note 1.

494. See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989) (discussing appointment of judges to the U.S. Sentencing Commission).

495. See, e.g., WILLOUGHBY, *supra* note 30, at 220–21; Earl C. Dudley, Jr., *Morrison v. Olson: A Modest Assessment*, 38 AM. U. L. REV. 255, 273 (1989) (arguing that the *Mistretta* decision went beyond the permissible role of the judiciary).

policymaking is more acceptable if the policy concerns a “uniquely judicial subject”).<sup>496</sup> These examples involve judges administering the law not as judges but, rather, as agency officials bringing to bear their judicial expertise.

The President might also limit judicial intervention by inoculating agencies from judicial review. Increased presidential power over agencies, beginning with the conferral of agency-reorganization power on the President<sup>497</sup> and including a growth in political staff<sup>498</sup> and more aggressive presidential leadership,<sup>499</sup> has rendered administrative agencies more “executive” in nature, for better or for worse. This may limit or interfere with the judiciary’s role in guiding agencies’ implementation of the law.

And yet, where presidential administration fails in terms of consistency or ethical leadership, or otherwise in the view of those less amenable to a unitary executive,<sup>500</sup> judicial administration may encourage more equitable administrative processes, stable precedent, and adherence to the rule of law in agency decision-making.<sup>501</sup> Increasing judicial oversight could stem the use (or misuse) of process to justify and obscure an increase in executive power,<sup>502</sup> by holding agencies accountable to constitutional norms and the expectations of positive law.<sup>503</sup> For instance, greater judicial control over the development and application of agency processes and expertise could improve the administration of law, particularly

496. See *Mistretta*, 488 U.S. at 408.

497. Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POL. SCI. REV. 1057, 1066 (1956).

498. *Id.*; see Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1037 (2017) (“There is [empirical] evidence that presidents seek to increase the number or proportion of political appointees in agencies that would otherwise be ideologically opposed to them.”); White, *supra* note 275, at 1403.

499. See Kaufman, *supra* note 497, at 1070 (“Much of our legislation originates in administrative agencies, and most proposed legislation is submitted to such agencies to determine what the President’s position on it ought to be.”); PRESIDENT’S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 29–30, 36 (1937) (discussing President Roosevelt’s contention that agencies should be wholly under control of the President); see, e.g., Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES. ENERGY & ENV’T L. REV. 287 (2019) (discussing President Trump’s executive order on regulatory review and his broad control over certain agencies, namely the Environmental Protection Agency).

500. See, e.g., Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227, 227–28 (1998) (discussing the dangers of the unitary executive thesis).

501. See Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 157 (2011).

502. See *supra* notes 127–130 and accompanying text.

503. See, e.g., William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1849–50 (2016) (discussing how courts hold agencies accountable to the Fourth Amendment).

if agencies' rush to further the President's agenda<sup>504</sup> results in sloppy administrative action.<sup>505</sup>

The promise that judicial administration holds for curbing the excesses of presidential administration is, as of yet, unrealized. The Court has, in some cases, curtailed executive branch policies, both presidential and administrative, via oversight of agency adherence to the requirements of constitutional due process and of the APA<sup>506</sup>—but perhaps most notably only when the breach has been egregious.<sup>507</sup>

In a number of recent cases, however, the Court has declined to intervene in policymaking resulting from presidential administration. For example, although President Trump's immigration ban on the residents of several countries debased constitutional principles, the Court subjugated the Establishment Clause to the President's plenary power in immigration law, instead of engaging with the potential constitutional violation associated with suspension of the entry of Muslim people into the United States.<sup>508</sup> Likewise, the Court let stand President Trump's diversion of funds toward the construction of a border wall, in the wake of his declaration of a national emergency.<sup>509</sup> Instead of contending with the potential statutory and constitutional implications of these actions, the Court dismissed the application for a stay on the grounds that the plaintiff had no cause of action, thereby effectively acquiescing to the President.<sup>510</sup>

504. Katyal, *supra* note 69, at 2317 (“[T]he risks of unchecked executive power have grown to the point where dispatch has become a worn-out excuse for capricious activity.”).

505. Buzbee, *supra* note 244, at 1360 (“Changes [in regulation] cannot be unjustified, purely political, or unacknowledged.” (footnote omitted)); *see also id.* at 1381–1417 (discussing various forms of sloppy policymaking happening at the whims of President Trump); Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 332–33 (1993) (arguing that allowing the President to manage agencies interferes with the administrative value determination); *cf.* Sunstein, *supra* note 213, at 463–65 (discussing how “the federal courts have also acted as an important check on administrative agencies,” primarily through the “hard-look doctrine” (footnote omitted)); Farber, *supra* note 207, at 5–6 (noting that Kagan predicted a growing “disregard for scientific expertise” as a result of presidential administration).

506. In a few recent examples, the Court has invalidated a presidential directive by declaring the resulting rule as suffering from an insufficient notice-and-comment process. *See supra* text accompanying notes 20–21, 203–204 (discussing *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019), and the DAPA case, *United States v. Texas*, 136 S. Ct. 2271 (2016)).

507. *See, e.g., Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2573–76 (2019) (holding that an agency’s action is illegitimate under the APA because it was based on pretext); *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–39 (2004) (holding that neither national security nor separation-of-powers principles allows the executive branch to violate the Fifth Amendment due process of an American citizen by holding detaining him indefinitely); *see also supra* notes 7–14; 248–262 and accompanying text; Sunstein, *supra* note 213, at 486 (noting that “judicial control is at best a partial safeguard against administrative malfeasance”).

508. *See generally* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

509. *See generally* *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

510. *See* Steve Vladeck, *Academic Highlight: The Quiet Doctrinal Shift (Likely) Behind the Border-Wall Stay*, SCOTUSBLOG (July 27, 2019, 11:16 AM), <https://www.scotusblog.com/2019/07/academic-highlight-the-quiet-doctrinal-shift-likely-behind-the-border-wall-stay/> [https://perma.cc/Z3QA-GMYT] (“[T]he decision is part of a larger, emerging trend . . . one in which the solicitor

Some cases remain open, but it appears unlikely that the Court will interfere with agencies' pursuit of the President's agenda.<sup>511</sup> For instance, fueled by a desire to express disapproval of a lower court's use of a nationwide injunction,<sup>512</sup> the Court declined recently to stay a controversial Department of Homeland Security regulation<sup>513</sup> that furthered President Trump's restrictionist immigration goals.<sup>514</sup> The Court chose to sustain this policy, before a final evaluation of its legitimacy, despite the fact that it both dramatically altered the meaning of long-standing immigration legislation and, by some accounts, infringes on constitutional norms.<sup>515</sup> This suggests the Court does not take these concerns seriously.

In addition, it appears unlikely that the Court will delegitimize the Environmental Protection Agency's recent rescission of the Clean Power Plan rules issued at the behest of President Trump, despite concerns that it might be arbitrary and capricious,<sup>516</sup> given that the rule was issued two years after the notice of proposed rulemaking without any pushback from the Court in the interim.<sup>517</sup> In

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general has been unusually aggressive in seeking emergency or extraordinary relief from the justices, and the court, or at least a majority thereof, has largely acquiesced.”).

511. See *supra* notes 128–129 and accompanying text.

512. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020) (referring derogatorily to the nationwide injunction against the Department of Homeland Security issued by a district court in the Second Circuit).

513. See *generally* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

514. Michael D. Shear & Emily Baumgaertner, *Trump Administration Aims to Sharply Restrict New Green Cards for Those on Public Aid*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2018/09/22/us/politics/immigrants-green-card-public-aid.html> [https://perma.cc/BQ5E-L3XR] (noting the new rule is the “latest in a series of aggressive crackdowns by President Trump and his hard-line aides on legal and illegal immigration”); Ed Kilgore, *Trump Moves Ahead with Ban on Public Assistance for Legal Immigrants*, N.Y.: INTELLIGENCER (Aug. 12, 2019), <https://nymag.com/intelligencer/2019/08/trump-seeks-ban-on-public-assistance-for-legal-immigrants.html> [https://perma.cc/QX86-G3NA] (noting that the new rule is “central to the administration’s strategy of reducing legal as well as illegal immigration”).

515. See Kilgore, *supra* note 514 (suggesting that the new rule impacts citizens and has had a “chilling effect on participation in non-cash public-assistance programs”); see also Camilo Montoya-Galvez, *New Trump Administration Rule Cracks Down on Welfare Benefits Use by Legal Immigrants*, CBS NEWS (Aug. 12, 2019, 9:09 PM), <https://www.cbsnews.com/news/what-is-a-public-charge-new-trump-administration-rule-cracks-down-on-welfare-use-by-legal-immigrants/> [https://perma.cc/Q3YT-5YNK] (noting that of the over 26,000 comments submitted within a 60-day public comment window, “nearly all [were] critical of” the regulation).

516. See *supra* notes 15–19 and accompanying text.

517. The rule was finalized in 2019, *supra* note 15, while the notice was issued in 2017. Approval and Promulgation of Air Quality Implementation Plans; Virginia; Amendment to Ambient Air Quality Standard for Ozone, 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 52).

both of these cases, the administrative policies encouraged by the President remain in place,<sup>518</sup> and in the case of the travel ban, have become more severe.<sup>519</sup>

The submissiveness of the Court in these cases suggests that those who view judicial intervention as an antidote to unabashed growth in agency or presidential power should focus on bolstering the judicial administration of agency processes.<sup>520</sup> Those concerned with growing executive power might promote a more vigorous fulfillment of the judiciary's role in ensuring constitutional due process.<sup>521</sup> The Court appears willing to consider concerns about the notice-and-comment process;<sup>522</sup> advocates might pursue such claims with more vigor. More drastically, reversing or pulling back on *Vermont Yankee* could allow the judiciary to require more robust rulemaking processes that better constrain the whims of presidential administration. For instance, the *HBO* case,<sup>523</sup> if expanded properly, could improve public awareness of "ex parte communications from the White House during the rulemaking period."<sup>524</sup> Reinvigoration of hard look doctrine<sup>525</sup> could encourage agencies to conform policies, such as the regulation of safety and greenhouse gases, to good science, instead of presidential interests. In addition, as is illustrated by the Census case,<sup>526</sup> judicial oversight may begin to serve the important function of ensuring that agencies behave ethically, regardless of whether they are influenced by the President's agenda.<sup>527</sup>

518. See RICHARD IRWIN, NAT'L IMMIGR. L. CTR., ONE YEAR AFTER THE SCOTUS RULING: UNDERSTANDING THE MUSLIM BAN AND HOW WE'LL KEEP FIGHTING IT (2019) ("Unfortunately, the Supreme Court turned a blind eye to the Trump administration's blatant bigotry when it allowed Muslim Ban 3.0 to go into full effect on June 26, 2018."); Liptak, *supra* note 127 (discussing *Kerry v. Din*); Linda Greenhouse, Opinion, *On the Border Wall, the Supreme Court Caves to Trump*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/trump-supreme-court-border-wall.html> [<https://perma.cc/SS2T-PR5A>] (noting that Trump compared the ruling to the Muslim ban cases, saying that in regards to the former, just as in the latter, the Court is likely to acquiesce to his policy); Dana Nuccitelli, *The Trump EPA Strategy to Undo Clean Power Plan*, YALE CLIMATE CONNECTIONS (June 21, 2019), <https://yaleclimateconnections.org/2019/06/the-trump-epa-strategy-to-undo-the-clean-power-plan/> [<https://perma.cc/T55X-SUH8>] (noting also that the new regulation will fail to reduce carbon emissions).

519. See Zolan Kanno-Youngs, *Trump Administration Adds Six Countries to Travel Ban*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html> [<https://perma.cc/RTN9-W82B>].

520. See Molot, *supra* note 336, at 1246 (arguing that "as the lone constitutional actor with no formal role in legislation or law execution the judiciary is the only entity available to place needed limits on government administration").

521. See *supra* Section I.A.

522. See *supra* text accompanying notes 20–21; 203–204 (discussing *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019), and the DAPA case, *United States v. Texas*, 136 S. Ct. 2271 (2016)).

523. *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977); see also text accompanying *supra* note 182.

524. Bruff, *Presidential Power and Rulemaking*, *supra* note 1, at 503–04.

525. See *supra* Section II.B; *supra* notes 235–236 (noting that hard look does not tend to change policy outcomes).

526. See *supra* text accompanying notes 254–262 (discussing the Court's focus on the agency's lack of integrity in *Department of Commerce v. New York*).

527. See *supra* Section II.B.1.

## CONCLUSION

Scholars, as led by now-Justice Kagan, have written about presidential administration in depth. The instant Article argues that the judiciary, too, administers the law. More specifically, it brings to the fore a comprehensive framework of “judicial administration.” In doing so, it sheds light on how courts sometimes administer in the role of custodian, or overseer, of agency compliance with law, while at other times, they assume administrative policymaking authority as deciders. Neither approach is inherent to any particular doctrine nor better than its complement—at least, from a functionalist perspective. Rather, both may be present in any administrative law context, and this Article’s foremost contribution is highlighting a long-standing tension between the two.

In addition, this Article contributes some thoughts on if and when judicial administration constitutes overreach. Anti-administrativists should be leery of the judiciary’s potential imposition on the other constitutional branches. Despite some formalists’ energetic interest in increasing judicial control over the administrative state, formal separation-of-powers principles caution against the exuberant transfer of policymaking power from agencies to courts.

To avoid a violation of a formal model of the separation of powers, even anti-administrativist Justices should calibrate judicial review of statutory interpretation to ensure that the judiciary requires agencies to follow Congress’s broad directions without implementing a new order in which courts make policy decisions primarily on their own. That having been said, reaffirmation of judicial oversight could help curtail the most pressing problems caused by and facing the executive branch, without offending a formal vision of the constitutional separation of powers. This approach might include enhancing the judicial role in ensuring executive compliance with constitutional norms, ethical agency conduct, and policymaking based in defensible administrative expertise.

